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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1965

No. 243

UNITED MINE WORKERS OF AMERICA,
PETITIONER,

vs.

PAUL GIBBS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 10, 1965
CERTIORARI GRANTED OCTOBER 11, 1965

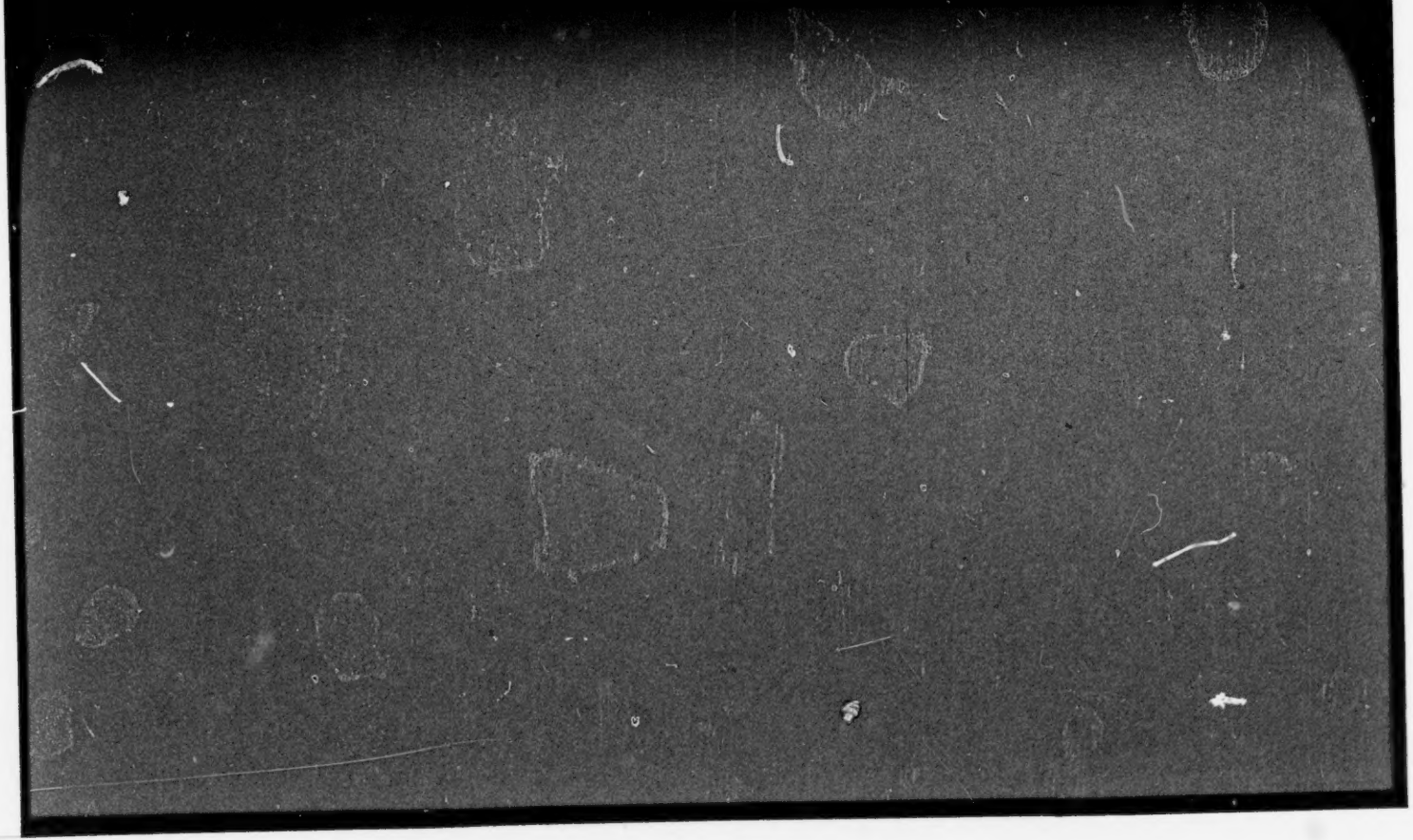




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DOCKET ENTRIES.

Date	Proceedings
1961	
8-23	Complaint filed.
8-23	Summons issued and mailed to U. S. Marshal for service.
8-28	Summons returned from the Marshal's Office, as they could not make the service, and summons mailed to Secretary of State for service.
9- 6	Summons returned executed as to the United Mine Workers of America and filed. Service through Secretary of State.
9-19	Order, Wilson, D. J., granting defendant twenty days from this date within which to answer or make defense, filed. C. O. Bk, 12, p. 138.
10- 4	Answer filed. Service of copy made by counsel.
1962	
2-26	Interrogatories propounded by defendant, United Mine Workers of America, to plaintiff, filed. Service of copy made by counsel.
3- 6	Order, Wilson, D. J. that plaintiff be granted 15 additional days within which to prepare and file answers or otherwise plead to interrogatories propounded by the defendant UMWA, filed. C. O. Bk. 12, p. 445.
4-17	Answers of Paul Gibbs to interrogatories, filed. Service by Counsel.
6-27	Discovery Deposition of Paul Gibbs, filed.
9- 5	Motion of defendant for an order relative to plaintiff's answers to interrogatories, filed, together with brief in support thereof. Service by counsel.

Docket Entries

Date 1962	Proceedings
9- 8	Pre-trial Conference, Wilson, D. J.
9- 8	Brief in reply to deft's motion for an order relative to the plaintiffs' answers to interrogatories, filed. Service by counsel.
9-21	Plaintiff's answers to defendant's interrogatories filed. Service by counsel.
9-25	Plaintiff's Memorandum Brief Pertaining to pre-trial order, filed. Service by counsel.
9-25	Plaintiff's motion for production of documents filed. Service by Counsel. Brief in support of motion filed.
9-25	Interrogatories propounded to defendant by plaintiff filed. Service by Counsel.
9-27	Pretrial Order, Wilson, D. J. filed.
10- 1	Motion of defendant, United Mine Workers, to dismiss action, together with brief in support of motion to dismiss, and motion for oral hearing, filed. Service by counsel.
10- 3	Order, Wilson, D. J. Extending time through Oct. 10, 1962 for defendant to object or answer the 31 interrogatories served upon it by plaintiff and also granting an extension of time thru Oct. 10, 1962 for deft. to file objections and supporting brief to the request for an order requiring it to produce and permit inspection and copying of the documents listed in motion recently served upon it, filed. Entered C. O. Bk. 14, p. 73. Service of copies by Clerk to both counsel.
10- 9	Plaintiff's notice to take deposition of Howard Madewell filed.

Docket Entries

Date	Proceedings
1962	
10- 9	Plaintiff's brief resisting defendant's motion to dismiss filed.
10-11	Deft's objections to granting of motion to produce filed.
10-11	Defendant's Answers to interrogatories of plaintiff filed.
10-11	Brief of defendant on objections to interrogatories propounded to it by plaintiff filed. Service by counsel.
10-18	Order, Wilson, D. J. amending complaint by striking certain paragraph and inserting a new paragraph filed. Entered C. O. Bk. 14, p. 132. Service by Clerk to both counsel of record.
10-18	Defendant's motion to dismiss heard, argued & taken under advisement.
10-23	Deposition subpoena for witness for pltf. returned executed and filed. C. O. Smith, DUSM—$6.10.
10-26	Notice from defendant of taking of depositions of James Miller, Howard Human, Desmer Church, filed.
10-26	Opinion on Motion to Dismiss, Wilson, D. J., overruling motion and requiring plaintiff to amend complaint within five days, order will enter accordingly, filed.
10-29	Supplemental answers of defendant to interrogatories propounded by the plaintiff filed.
11- 1	Deposition subpoenaes for 3 witnesses for deft. returned executed and filed. C. A. Smith, DUSM—$3.56.

Docket Entries

Date	Proceedings
1962	
11- 7	Depositions of Stanlee Hampton, Paul V. Collis, N. B. Allison and C. Houston Beaumont filed.
11- 7	Depositions of Ted K. Gibbs, Paul Gibbs, George Ramsey, Howard Higgins, Howard Cecil Human, Howard Madewell & Geo. Gilbert filed.
11- 7	Order, Wilson, D. J. amending complaint as to paragraph IX & X, filed. Entered C. O. Bk. 14, p. 194. Service by Clerk by handing copies to both counsel.
11- 7	Came the parties in person and by counsel, and the trial of this cause to a jury was begun as part of plaintiff's proof was presented and the jury was respited until 9:00 a. m., Thursday, Nov. 8, 1962. Wilson, D. J. Entered C. O. Bk. 14, p. 197-A.
11- 8	Five subpoenaes for 14 witnesses for plaintiff returned executed and filed. J. M. Irwin, DUSM—$4.40.
11- 8	Came the parties in person, and by counsel, and came the same jury as of yesterday and the trial of this cause was resumed. Part of plaintiff's proof heard and the jury was respited to 9:00 a. m., Friday, Nov. 9, 1962. C. O. Bk. 14, p. 199.
11- 9	Subpoena for witness for plaintiff returned executed and filed. J. H. Stephens, DUSM—$3.10.
11- 9	Came the parties in person and by counsel and came the same jury as of yesterday and the trial of this cause was resumed. Plaintiff's proof completed. Defendant made motion to dismiss and also motion for directed verdict. Both motions overruled by the

Docket Entries

Date	Proceedings
	Court. Part of defendant's proof heard. Jury respited to Monday, Nov. 12, 1962, at 9:00 a. m. C. O. Bk. 14, p. 201.
11-10	Subpoenaes for 14 witnesses for plaintiff returned executed and filed. C. A. Smith, DUSM—$54.60.
11-12	Came the parties in person and by counsel and came the same jury as of Friday, and the trial of this cause was resumed. Defendant's proof completed. No rebuttal. Jury respited until Tuesday, Nov. 13, 1962 at 9:00 a. m. C. O. Bk. 15, p. 1.
11-13	Hearing on motions this date: Defendant, by counsel, made six motions to dismiss the case; Court overruled motions one, five and six and sustained motions two, three and four, hearing adjourned until Wednesday, November 14, 1962.
11-14	Came the parties in person and by counsel and came the same jury as of yesterday and the trial of this cause was resumed. Defendant made motion for a mis-trial; overruled. Argued by counsel. Charge of the Court. In arbitration. Jury respited until Thursday, November 15, 1962, at 9:00 a. m. Entered C. O. Bk. 15, p. 15.
11-15	Four subpoenaes for witnesses for plaintiff returned executed and filed. C. A. Smith, DUSM—$7.50.
11-15	Two subpoenaes for witnesses for defendant returned executed and filed. C. A. Smith, DUSM—$1.00.
11-15	Came the parties in person and by counsel and came the same jury as of yesterday, and the trial of this

Date	Proceedings
1962	
	cause was resumed. The jury returned with a verdict in favor of the plaintiff in the amount of $74,500 for compensatory damages and $100,000 for punitive damages. Entered C. O. Bk. 15, p. 19.
11-16	Lodged: Judgment Order.
11-23	Motion of United Mine Workers of America for judgment in accordance with motion for directed verdict or in the alternative motion for a new trial (filed in Knoxville Office). Service by Counsel.
11-27	Judgment: Wilson, D. J. Plaintiff, Paul Gibbs, recover of UMW total sum of $174,500.00 with interest at 6% from date of judgment filed. C. O. Bk. 15, p. 41. Service by Clerk to counsel for plaintiff and to counsel for defendant.
11-28	Memorandum on behalf of defendant, United Mine Workers of America, filed. Certificate of service by counsel.
1963	
1-25	Order, Wilson, D. J., upon agreement of parties that defendant shall have to and including Feb. 1, 1963 to file brief in support of its motion for judgment or a new trial and plaintiff shall have until Feb. 15, 1963 to its brief in opposition thereto filed. C. O. Bk. 15, p. 208. Service by clerk to both counsel of record. (Mr. E. H. Rayson and Joe Vanderveer)
2- 4	Order, Wilson, D. J. upon agreement of parties that defendant is allowed until February 11, 1963, in which to file its brief in support of its motion for judgment in accordance with its motion for directed

Date	Proceedings
1963	verdict and in the alternative for a new trial, and the plaintiff is allowed until March 1, 1963, in which to file its reply brief, filed. C. O. Bk. 15, p. 244. Service by counsel.
2-11	Defendant's motion for leave to file brief in support of motion for new trial, together with brief, filed. Service by counsel.
3- 1	Plaintiff's motion for leave to file a reply brief resisting the defendant's motion for a judgment n. o. v. or in the alternative for a new trial filed. (Proposed brief submitted herewith)
3-14	Hearing on defendant's motion for new trial, argued and taken under advisement by the Court.
7- 2	Supplemental Brief of plaintiff filed. Service by counsel.
7-18	Opinion, Wilson, D. J., that verdict of jury should be set aside as to issue of loss of plaintiff's employment contract due to statutory secondary boycott. Also, that jury verdict awarding damages to the plaintiff on the issue of loss of his trucking contract by reason of boycott and conspiracy, should be set aside. Defendant's motion for judgment n. o. v. upon the two above issues should be sustained. And unless plaintiff agrees to accept remittitur of $30,000 on issue of damages by reason of loss of plaintiff's employment contract as a result of conspiracy, and to accept a remittitur of $55,000 in the jury verdict on the issue of punitive damages, the issues should be submitted to another jury and a new trial ordered. Service to counsel by clerk.

Docket Entries

Date 1963	Proceedings
7-23	Lodged: Proposed judgment order. Filed by attorneys for defendant.
7-23	Lodged: Proposed judgment order. Attorneys for Plaintiff.
7-26	Filed: Objection to form of judgment lodged by plaintiff; and memorandum on form of judgment submitted for entry, by deft. Service by counsel.
8-26	Judgment, Wilson D. J., (1) that the defendant's motion for judgment n. o. v. on the issue of the loss of plaintiff's trucking contract, be sustained and judgment heretofore entered modified accordingly so as to eliminate the award of $14,500.00 made by the jury to the plaintiff. (2) Defendant's motion for judgment n. o. v. on the issue of loss of plaintiff's employment contract is sustained insofar as said motion is directed to the assertion of said claim upon the basis of secondary boycott, but said motion for judgment n. o. v. is overruled insofar as this claim is based upon alleged common law conspiracy. (3) Verdict of the jury in awarding $60,000 to plaintiff for loss on his employment contract is excessive by $30,000.00 and punitive damages is excessive to the extent of $55,000.00. Accordingly, a remittitur in the sum of $30,000.00 on issue of loss in connection with employment contract; and a remittitur in the sum of $55,000.00 upon the issue of punitive damages is suggested. (4) Plaintiff, Paul Gibbs is to recover from defendant, UMW, $75,000.00 with interest thereon at the rate of 6% per annum from and after date of entry of this judgment, clerk to pay this to law firm of Van

Date	Proceedings
1963	
	Derveer, Brown and Siener, when paid into the court. (5) Various grounds of the motion for judgment n. o. v. and for new trial are referred to in this judgment and overruled. Service by clerk. Entered C. O. Book 17, pp. 276, 277.
8-26	Consent to reduce Verdict filed by attorneys for plaintiff. Service by counsel.
9- 4	Order, Wilson, D. J. correcting clerical error in judgment order entered 8/26/63, filed. Entered C. O. Bk. 18, p. 1. Service of copies by Clerk to both counsel of record.
9-25	Notice of appeal by deft., U. M. W., with cost bond in sum of $250.00 filed. Service of copy made by counsel.
9-25	Notice of appeal by pltf., Paul Gibbs, with cost bond, filed. Service by counsel.
10- 2	Motion (Petition) of U. M. W. for an order preventing and staying issuance of any execution on the judgment herein rendered, such stay to remain in full force and effect until after final adjudication by Court of Appeals on appeal prayed by the pltf. filed.
10- 4	Agreed Order, Wilson, D. J. that execution shall not issue on judgment entered, except upon failure of deft. to post supersedeas bond after 10 days notice of demand therefor by pltf. filed. Entered C. O. Bk. 18, p. 94.
	Envelope of Exhibits.

Complaint

In the
DISTRICT COURT OF THE UNITED STATES
For the Eastern District of Tennessee,
Southern Division.

PAUL GIBBS,
Plaintiff,

vs.

THE UNITED MINE WORKERS, OF AMERICA,
Defendant.

Civil Action.
No. .....

COMPLAINT—FILED AUGUST 23, 1961.

Comes the plaintiff, Paul Gibbs, by his attorneys, and sues the defendant, The United Mine Workers of America, for the sum of Two Hundred Fifty Thousand Dollars ($250,000.00) as compensatory damages, and One Hundred Thousand Dollars ($100,000.00) as punitive damages and for cause of action says:

I.

That he is a citizen and resident of Grundy County, Tennessee. That the defendant is an unincorporated labor organization or union maintaining its principal place of business outside the State of Tennessee, but whose activities extend into Marion County, Tennessee. That the plaintiff lives within, and the defendant's activities extend into the Southern Division of the Eastern District of Tennessee.

II.

That this is a civil action, and the amount in controversy, exclusive of interest and costs, exceeds the sum of Ten Thousand Dollars ($10,000.00), and the grounds upon

which the jurisdiction of this Court depends is the aforesaid diversity of citizenship of the party-plaintiff, the party-defendant and the amount in controversy and in addition thereto depends upon 29 U. S. C. A. 187 or the Secondary Boycott provision of the Labor Management Relations Act.

III.

That the Tennessee Consolidated Coal Company, a Delaware corporation, has for many years maintained an office and place of business at Tracy City, Tennessee, where it engaged in the business of mining, processing and selling coal. That some time prior to the date hereinafter mentioned, the Grundy Mining Company was established as a wholly owned subsidiary of the Tennessee Consolidated Coal Company. Pursuant to a contract, the Tennessee Consolidated Coal Company had leased certain land to the Grundy Mining Company and by the terms of the contract agreed to sell all coal produced by the Grundy Mining Company. That some time prior to the date hereinafter set forth, the Tennessee Consolidated Coal Company was awarded a contract by the United States Navy for coal produced by the Grundy Mining Company valued at more than One Hundred Fifty Thousand Dollars ($150,000.00) and that in addition thereto there was an available market for all coal to be produced by Grundy Mining Company.

IV.

That some time prior to the date hereinafter set forth the Grundy Mining Company employed the plaintiff, Paul Gibbs, as its mine superintendent for five mines located in Marion County and known as the Gray's Creek Mines, with full authority to supervise and oversee the operation of the mines. That his monthly salary was to be Six

Hundred Dollars ($600.00) per month. That in addition thereto the Grundy Mining Company had agreed with the plaintiff, Paul Gibbs, that he would be paid for all "haulage" of coal away from the mines. That the mines would have produced approximately two thousand (2,000) tons per day and that the plaintiff, Paul Gibbs, would be paid at the rate of Seventy-Eight Cents ($.78) per ton, furnishing, of course, his own trucks and equipment.

V.

That the events hereinafter complained of took place on the 15th day of August, 1960, and early in the morning of the 16th day of August, 1960.

VI.

That the defendant having heard that the Grundy Mining Company was about to open certain new mines gathered near the site on the date first above mentioned and formed a certain "picket line". That the plaintiff, Paul Gibbs, was then and there told and advised in no uncertain terms that he, the Grundy Mining Company, nor anyone else would open or operate these mines. That the following morning a "mob" of approximately one hundred (100) men were at or near the site and among those present and actively furthering the "mob's" activities were members of the defendant. That most, if not all members of this "mob" were armed, most of them carrying shot guns. That the plaintiff had made arrangements for approximately eighteen or twenty miner-employees to work the mines and these miner-employees were to report on this date. That as these miner-employees approached the site of the mines, they were stopped by the "mob", cursed, threatened and told that they could not work this particular mine, that if the mine

was to be worked, the members of the defendant union would work it and that the miner-employees were warned that they had the choice of leaving or being killed. Discretion caused the miner-employees to leave at once, hurried on their way by the blasts of shotguns behind. Shortly thereafter the plaintiff, Paul Gibbs, arrived upon the scene where he was immediately stopped by the "mob". One of the defendant's members informed the plaintiff, Paul Gibbs, that he was about to be killed and reached into the cab of the plaintiff's, Paul Gibbs, truck to pull him out. For some time thereafter the "mob" ruled, running rampant, cursing, discharging firearms and otherwise. Shortly thereafter the plaintiff, Paul Gibbs, was ordered back into his truck and by the "mob" escorted to a point some two or three miles distant to a road leading to another mine. There, and in the presence of the plaintiff, Paul Gibbs, members of the defendant union did violently beat and whip a person not a member of the defendant union.

VII.

That in addition to the acts hereinabove set forth and complained of the defendant went to and told, advised and instructed others with whom the Grundy Mining Company and/or the plaintiff herein, Paul Gibbs, were doing business, or would have done business that if they did any business with the Grundy Mining Company and/or the plaintiff herein, Paul Gibbs, that they would suffer a similar fate.

VIII.

That by reason of the hereinabove complained of acts the plaintiff, Paul Gibbs, and/or the Grundy Mining Company has never been able to open or operate its mines and to this date they remain closed.

IX.

That the defendant has continued making threats of dynamiting, killing, beatings and otherwise to the Grundy Mining Company and the Tennessee Consolidated Coal Company, that if either of these companies employed the plaintiff, Paul Gibbs, or utilize his services in any way, that the officials of the Grundy Mining Company and/or the Tennessee Consolidated Coal Company and/or the properties of these companies will be dynamited, blown up or otherwise destroyed.

X.

The plaintiff, Paul Gibbs, avers that the defendant is and was guilty of an unlawful conspiracy aimed at him and the Grundy Mining Company to maliciously, wantonly and wilfully interfere with his contract of employment. That the defendant is therefore liable to him for both compensatory and punitive damages.

Wherefore, the plaintiff, Paul Gibbs, sues the defendant for Two Hundred Fifty Thousand Dollars ($250,000.00) as compensatory damages and for One Hundred Thousand Dollars ($100,000.00) as punitive damages and demands a jury to try the case.

s/ JOE VAN DERVEER,
VAN DERVEER, BROWN & SIENER,
The James Building,
Chattanooga, Tennessee.

In the
UNITED STATES DISTRICT COURT
For the Eastern District of Tennessee,
Southern Division.

PAUL GIBBS

vs.

UNITED MINE WORKERS OF AMERICA.

No. 3771.

ANSWER TO ORIGINAL COMPLAINT—FILED OCTOBER 4, 1961.

For answer to the complaint filed herein, defendant says:

First Defense.

This Court is without jurisdiction over the subject matter of the controversy set forth in the complaint.

Second Defense.

This Court is without jurisdiction over the person of the defendant.

Third Defense.

The Complaint fails to state a claim upon which relief can be granted.

Fourth Defense.

For further answer to the complaint, and each paragraph thereof, defendant says:

Answer to Original Complaint

1. For answer to Paragraph 1 defendant is without knowledge of plaintiff's residence and neither admits nor denies the same; the other allegations are admitted.

2. For answer to Paragraph 2 defendant admits that this is a civil action and that the amount sued for exceeds Ten Thousand Dollars; it denies plaintiff's allegations of jurisdiction.

3. For answer to Paragraph 3 defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

4. For answer to Paragraph 4 defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

5. For answer to Paragraph 5 defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

6. For answer to Paragraph 6 defendant is without knowledge or information sufficient to admit or deny whether acts as described therein occurred; but defendant denies, if such acts did in fact occur, that such acts were committed or participated in by defendant or by any person or group of persons authorized by or acting on behalf of the defendant.

7. Defendant denies the allegations of Paragraph 7.

8. Defendant denies the allegations of Paragraph 8.

9. Defendant denies the allegations of Paragraph 9.

10. Defendant denies the allegations of Paragraph 10.

Defendant denies that it is liable to plaintiff in any amount.

Defendant denies each and every allegation of the complaint not admitted or denied herein and denies that plaintiff is entitled to recover any amount from defendant.

HARRISON COMBS,
HARRISON COMBS,
900 Fifteenth Street, N. W.,
Washington, D. C.,
E. H. RAYSON
E. H. RAYSON,
R. R. KRAMER,
R. R. KRAMER,
Burwell Building,
Knoxville, Tennessee.

ANSWERS TO INTERROGATORIES—FILED APRIL 17, 1962.

Comes the plaintiff herein, Paul Gibbs, and for answer to the interrogatories propounded to him says:

* * * * * * * *

3. What was plaintiff's income during each year from 1950 to date? Kindly file copies of plaintiff's income tax returns for the years 1956 to date as an exhibit to your answer.

Tax returns for years 1950 and 1951 not available. 1952 profit $6,468.33; 1953 profit $14,685.90; 1954 profit $5,748.68; 1955 profit $10,971.83; 1956 profit $17,084.36; 1957 loss $2,658.41; 1958 loss $23,476.87; 1959 profit $577.64; 1960 loss $44,713.33. Copies of tax returns for 1956 to date are attached hereto.

* * * * * * * *

6. Was plaintiff's contract with Grundy as a mine superintendent a written or oral contract? If it was a

written contract, kindly file a copy thereof herewith. If it was an oral contract, state precisely what the terms of the contract were.

Oral.

7. State whether plaintiff's alleged haulage contract with Grundy was in writing or oral. If it was in writing, file a copy thereof as an exhibit to the answer. If it was oral, state precisely the terms thereof.

Oral. Seventy eight cents (78¢) per ton.

* * * * * * * *

9. State whether the "five mines" referred to in paragraph IV of the Complaint were operating mines at the time of the matters complained of herein.

No.

10. If the answer to question 6 is "No", state what plaintiff was to do with respect to the "five mines" and when it was contemplated the mines would be in operation.

Mine Superintendent to operate the mines.

11. Had plaintiff performed any part of the work contemplated by his haulage contract with Grundy as of the time of the matters complained of herein? If your answer to this interrogatory is "Yes", state in detail that part of the work which had been performed.

No.

12. As of August 15-16, 1960, and with respect to plaintiff's haulage contract with Grundy Mining Company.

(a) What equipment did plaintiff intend to use in the performance of the haulage contract?

Eight (8) dump trucks.

(b) What items of such equipment did plaintiff then own?

Eight (8) dump trucks.

(c) If plaintiff owned any of such equipment, state when and from whom plaintiff acquired such equipment and the price paid for each item thereof. File as an exhibit to your answer copies of the bills of sale evidencing such purchases.

Five (5) Tandom trucks from Alison Motors priced at $16,233.36 each. Two (2) trucks purchased from Alison Motors priced at $8,500.00 each. One (1) truck purchased at Truck & Trailer and priced at $16,801.00. Only one Bill of Sale available, copy attached hereto, others essentially same.

(d) Where was such equipment located as of August 15-16, 1960?

Marion County, Tennessee.

(e) If such equipment was not then being used on the haulage contract, in what work, if any, was such equipment then being used?

Work at Pikeville Coal Company.

(f) How many persons did plaintiff employ or intend to employ in the performance of the haulage contract?

Eight (8) or ten (10).

(g) If plaintiff had employed any persons who were to work on the haulage contract, identify them by name and present address.

Would have used same drivers.

* * * * * * *

My Commission expires: .....

Certificate.

I, Joe Van Derveer, certify that a true and exact copy of these answers to interrogatories has been served upon counsel for the defendant by placing a true and exact copy of said answers to interrogatories in the United States mail, addressed to said counsel at his office, with sufficient postage thereupon to carry the same to its destination.

This ..... day of April, 1962.

JOE VAN DERVEER.

* * * * * * *

PRE-TRIAL ORDER—FILED SEPTEMBER 27, 1962.

This matter having come before the Court upon September 8, 1962, at a pre-trial conference held before Frank W. Wilson, United States District Judge, pursuant to Rule 16 of the Federal Rules of Civil Procedure and Joe Van Derveer and Harold E. Brown having appeared as counsel for the plaintiff and E. H. Rayson and Donaldson Leake having appeared as counsel for the defendant, the following action was taken:

(1) **Jurisdiction**: This is an action for damages alleged to have been sustained by the plaintiff by reason of a secondary boycott under the provisions of Title 29, Section 187, as amended. It is further contended by the plaintiff that the Court having jurisdiction by reason of a federal question under the foregoing statute, the Court would have ancillary jurisdiction of the plaintiff's alleged cause of action for tortious interference with the plaintiff's contractual rights and obligations. The jurisdiction of the Court is disputed by the defendant. It is the contention

of the plaintiff that the secondary boycott forming the basis of the jurisdiction was (a) the action of the Union against Tennessee Consolidated Coal Company, (b) the action of the Union against Tennessee Products and Chemical Corporation, and (c) others to be identified by the plaintiff in answers to interrogatories as hereinafter ordered. The parties are to seek to resolve the jurisdictional issues by appropriate motions prior to the trial of the case.

(2) **General Nature of the Claims of the Parties:** The plaintiff contends that sometime prior to August 15, 1960, the Tennessee Consolidated Coal Company organized a wholly owned subsidiary known as Grundy Mining Company, which Company in turn contracted to employ the plaintiff at $600.00 a month as its mine superintendent for five mines it proposed to open in the Grays Creek Area of Marion County, Tennessee. The plaintiff further held a contract with the Grundy Mining Company for hauling all coal mined at 78¢ per ton. It is alleged that a ready market existed for all of the coal to be mined and that the mines would have produced approximately 2,000 tons per day. The plaintiff further alleges that upon August 15, 1960, he and some 18 or 20 miners whom he had employed attempted to report to begin mining operations for Grundy Mining Company but that the defendant Union had organized a picket line that was in fact an armed mob, who by violence and threats of violence prevented the plaintiff or the miners he had employed from entering upon the mine property or beginning work. It is further alleged that the defendant likewise advised others with whom Grundy Mining Company and the plaintiff were doing business that they would receive the same violent treatment if they did any business with either Grundy Mining Company or the plaintiff, and that these threats have continued, resulting in Grundy Mining Company never having

been able to open or operate its business. It is alleged that the defendant is guilty of an unlawful conspiracy against the plaintiff and the Grundy Mining Company to maliciously interfere with the plaintiff's employment contract and the plaintiff claims both compensatory and punitive damages as a result thereof.

The defendant, in addition to denying any jurisdiction, has entered a general denial of all charged by the plaintiff.

(3) **Admissions, Stipulations and Uncontroverted Facts**: The following facts are established by admissions in the pleadings or by stipulations of counsel at the pre-trial conference:

(a) It is agreed and stipulated that Grundy Mining Company was a wholly owned subsidiary of Tennessee Consolidated Coal Company.

* * * * * * *

(6) **Requests for Jury Instructions**: Requests for jury instructions shall be submitted to the Trial Court at the commencement of the trial, but there is reserved to the counsel for the respective parties a right to submit supplemental requests for instructions during the course of the trial or at the conclusion of the evidence, or at the conclusion of the charge, upon matters that cannot be reasonably anticipated.

* * * * * * *

Approved for Entry.

FRANK W. WILSON,
United States District Judge.

* * * * * * *

MOTION TO DISMISS—FILED OCTOBER 1, 1962.

Comes the defendant, United Mine Workers of America, and moves the Court as follows:

1. To dismiss this action because the complaint fails to state a claim against the defendant upon which relief can be granted in that the complaint fails to set forth a cause of action under 29 USC 187, as amended.

2. To dismiss the complaint insofar as plaintiff purports to assert therein a cause of action based on State Law on the ground that this Court is without jurisdiction to hear and determine the same.

Wherefore, defendant prays the judgment of the Court hereon.

* * * * * * *

ORDER AMENDING COMPLAINT—FILED OCTOBER 18, 1962.

Upon application of the plaintiff and for good cause shown, it is Ordered that the Complaint, heretofore filed, be and is hereby amended by striking therefrom paragraph IX and inserting therein a new paragraph IX, as follows:

> That the defendant has continued making threats of dynamiting, killing, beatings and otherwise to Paul Gibbs and the Grundy Mining Company and, in addition thereto, has made threats to the Tennessee Products and Chemical Company, a neutral employer, that if they continued doing business with the plaintiff, Paul Gibbs, that they would suffer a similar fate. In addition to these complained of acts the defendant has also (encouraged and induced) other employees

of neutral employers as well as other persons not to do business with the plaintiff, Paul Gibbs.

Approved for Entry:

FRANK W. WILSON,
United States District Judge.

* * * * * * *

OPINION ON MOTION TO DISMISS—FILED OCTOBER 26, 1962.

By motion to dismiss the defendant has raised the issue of the jurisdiction of the Court in this case. The complaint purports to allege a cause of action for damages as a result of a secondary boycott arising out of a labor dispute and for damages as a result of an unlawful conspiracy to injure the plaintiff in his employment and otherwise. Jurisdiction purports to be alleged in the complaint upon the grounds of diversity of citizenship and jurisdictional amount and upon the grounds that a federal question exists under 29 U. S. C. A. 187, the secondary boycott provision of the Taft-Hartley Act. The motion to dismiss is based upon two grounds, first that the complaint fails to allege a cause of action under federal law (29 U. S. C. A. 187), and second that the Court is without jurisdiction to try the alleged common law action of tort or conspiracy.

For the exact allegations of the complaint it is of course necessary to refer verbatim to the complaint. By way of summary, however, it appears that the complaint purports to allege that the plaintiff had an employment contract to act as mine superintendent with Grundy Mining Company at a salary of $600 per month, and in addition a truck hauling contract with the same company to haul all coal mined at 78¢ per ton, and that the plaintiff was deprived of the benefits of both the employment contract

and the trucking contract by action of the defendant Union in preventing the opening of the Grundy Mining Company mines by mob action and violence. Some lack of clarity in this respect is caused by the omission in the final paragraph of the complaint of any reference to the loss of the trucking contract, the plaintiff's damages there being confined to the interference "with his contract of employment."

In addition to the above rather specific allegations, by amendment to the complaint the plaintiff alleges that the defendant has threatened, induced and encouraged other "neutral employers," including Tennessee Products and Chemical Company, "not to do business" with the plaintiff.

As indicated above, the complaint purports to allege federal jurisdiction on the grounds of diversity of citizenship and jurisdictional amount. However, the defendant is alleged to be an unincorporated association and for jurisdictional purposes in diversity cases, the unincorporated association can have no citizenship apart from that of its members and proper citizenship of all members must be alleged to exist before diversity will exist. 2 Barron & Holtzoff, Federal Practice and Procedures, sec. 487.

Upon the basis of the allegations of the complaint, the defendant contends that there is no allegation of an actionable secondary boycott under 29 U. S. C. A. 187, in that (1) any alleged loss or damage to the plaintiff was a result of primary action of the Union toward Grundy Mining Company and not a secondary boycott, and that the alleged existence of violence does not in any way affect the existence or non-existence of a secondary boycott, (2) the plaintiff, as a supervisory employee of Grundy Mining Company, was not such a "person" as is referred to in 29 U. S. C. A. 187 as having a cause of action by

reason of a secondary boycott, (3) the primary dispute was between the defendant and Grundy Mining Company, and that the plaintiff was acting as a part of the primary employer, and therefore no secondary boycott existed, (4) the alleged actions of the defendant to get others "not to do business" with the plaintiff is unconnected with any loss alleged by the plaintiff, and therefore not an actionable allegation of a secondary boycott. It is further contended by the defendant that, there being no jurisdiction by reason of a federal question, the Court is without jurisdiction of the alleged common law conspiracy or tortious conduct allegations.

On the basis of the allegations in the complaint, the plaintiff asserts more than one interpretation of the complaint. He contends that a secondary boycott under 29 U. S. C. A. 187 is alleged (1) in that the primary dispute was between Gibbs and the Union, and the union activity as to Grundy Mining Company insofar as it affected Gibbs was therefore secondary, (2) in that the primary dispute was between Gibbs and the Union, and the union activity as to employees of Gibbs was therefore secondary, (3) in that union activity and threats toward Tennessee Products and Chemical Company to induce it not to do business with Grundy Mining Company and the plaintiff was a secondary boycott as to both the plaintiff and Grundy Mining Company, (4) in that the Union activity and threats toward "others" to induce them not to do business with the plaintiff was a secondary boycott, (5) in that union activities and threats toward employees of Grundy Mining Company was a secondary boycott as to the plaintiff, and (6) in that union activities and threats toward employees of Southern Labor Union was a secondary boycott as to the plaintiff. It is further contended by the plaintiff that the Court, having jurisdiction over

the secondary boycott phase of the case, therefore has ancillary jurisdiction over the common law conspiracy for tortious conduct allegations of the complaint. The Court has difficulty in reading into the complaint all of the various theories advanced by the plaintiff. Part of the difficulty is occasioned by the fact that the complaint is quite specific as to the employment and trucking contracts of the plaintiff with Grundy Mining Company and the union activities toward Grundy Mining Company depriving the plaintiff of the benefits of these contracts, but any other theory of the plaintiff's cause of action must be based upon either (1) a general allegation that "others" were involved, or (2) a specific allegation that Tennessee Products and Chemical Company was involved. No allegation of damage is alleged with respect to the latter two allegations except that they were induced "not to do business" with the plaintiff. The specificness of the complaint in some respects, coupled with its extreme generality in other respects, can be misleading.

Although the Court is unable to read into the complaint all of the theories advanced by the plaintiff with respect to the allegations of a secondary boycott, and, although the Court would be unable to accept each of the plaintiff's theories as constituting a secondary boycott under 29 U. S. C. A. 187, even if they were read into the complaint, nevertheless it does appear to the Court that a secondary boycott may be sufficiently alleged so that the plaintiff should not be put out of court on a motion to dismiss. (This conclusion is fortified by the practice of general pleading permitted in the federal courts.)

First it appears that the allegation that the defendant induced or encouraged Tennessee Products and Chemical Company and "others" "not to do business" with the plaintiff might allege a secondary boycott within the Act.

It is pointed out by the defendant that there is no alleged connection between this allegation and the Grundy Mining Company or any damages which the plaintiff sustained. Under Sec. 187 (b) only damages that are a result of the secondary boycott would be recoverable. Although no specific damages are alleged to have resulted from the defendant's having induced or encouraged Tennessee Products and Chemical Company or "others" not to do business with the plaintiff, damages might be inferred from such an allegation. In view of the fact that other specific injuries and damages are alleged in the complaint, and in view of the fact that the plaintiff will be required on the trial to establish by evidence such injury before the case can be submitted to the jury on this theory of a secondary boycott, it is the opinion of the Court that the plaintiff should be required to further amend his complaint to allege what, if any, injury the plaintiff sustained as a result of the matters alleged in paragraph IX of the amended complaint. If no injury or damage can be alleged or proven as a result of the union activity toward Tennessee Products and Chemical Company or "others," then this theory of jurisdiction should be removed from the case without the necessity or expense of a trial.

It further appears to the Court that a secondary boycott may be alleged or inferred from the complaint so as to grant jurisdiction upon the theory that a primary labor dispute existed between the plaintiff and the defendant, and that one object of the Union in its activities toward Grundy Mining Company was unlawfully to induce or persuade Grundy Mining Company to cease doing business with the plaintiff. It is contended by the defendant that the primary dispute alleged is between Grundy Mining Company and the Union. A prohibited secondary boycott is defined at 29 U. S. C. A. 158 (b) (4)

as the inducing or encouraging of others if the "object" thereof is to cause them to cease doing business with another. The crux of the matter therefore is as to whether any part of the "object" of the Union in its activities involving Grundy Mining Company was to cause it to cease doing business with the plaintiff. The fact that it may have had other or additional purposes does not relieve it of the charge of a secondary boycott. As stated in the case of **Flame Coal Company v. United Mine Workers of America,** 303 F. 2d 39 at 42, "This Union cannot escape the charge of secondary boycott because it chose to attack on all fronts at once, claiming its desire and objective to be the recognition of all involved, whether producers, transporters or processors of coal." What the object of the Union may have been in its activities toward Grundy Mining Company may be in dispute and therefore a motion to dismiss should not be sustained upon this.

The defendant relies upon the case of **Seeley v. Brotherhood of Painters** (C. A. 5), ... F. 2d ..., 51 L. R. R. M. 2042, wherein the Court held that a supervisory employee was not such a "person" as would be entitled to a cause of action under the secondary boycott provision of the Taft-Hartley Act for his discharge by his employer as a result of the Union's inducing or encouraging his employer to do so. Without passing upon the rationale of the **Seeley** case at this time, it is sufficient to point out in the present case that the injury to the plaintiff may be in his capacity as a trucker and not merely as an employee. It would appear that in his capacity as an independent trucker the plaintiff would be such a "person" as would be entitled to assert rights under the Federal Boycott Law.

Having determined that the defendant's motion to dismiss upon the ground that no federal question is involved

should be overruled, it would follow that the defendant's motion to dismiss the common law charge of conspiracy or tort for lack of jurisdiction should likewise be overruled. Under the case of **Hurn v. Ousler**, 89 U. S. 238, the Court, having jurisdiction of the federal question, would have ancillary or pendent jurisdiction of the common law allegations.

The defendant's motion to dismiss will therefore be overruled. However, the plaintiff will be required to amend his complaint to allege more specifically any damages claimed to have resulted by reason of the matters alleged in paragraph IX of his complaint as amended, or otherwise this paragraph will be stricken from the complaint. This amendment shall be made within five (5) days.

An order will enter accordingly.

FRANK W. WILSON,
United States District Judge.

**ORDER AMENDING COMPLAINT—
FILED NOVEMBER 7, 1962.**

Upon application of the plaintiff and for good cause shown, it is Ordered that the complaint heretofore filed be and hereby is amended as follows:

(1) By adding to Paragraph IX as follows:

"That by reason of the said secondary boycott he has been unable to obtain contracts of haulage that he otherwise would have gotten, has been unable to hire employees that he otherwise would have been able to hire, has had certain leases of coal lands cancelled so that he was unable to continue in business, and has been unable to obtain

leases of coal lands that he otherwise could have obtained and has lived in constant fear and under a constant economic pressure."

(2) By striking Paragraph X and inserting a new Paragraph X as follows:

"The plaintiff, Paul Gibbs, avers that the defendant is and was guilty of an unlawful conspiracy and an unlawful boycott aimed at him and the Grundy Mining Company to maliciously, wantonly and willfully interfere with his contract of employment and with his contract of haulage. The defendant is therefore liable to him for both compensatory and punitive damages."

Approved for Entry.

FRANK W. WILSON,
United States District Judge.

* * * * * * *

VERDICT FORM.

(1) Did the defendant or any person or persons for whom it was legally responsible commit any activities or engage in any conduct directed toward Grundy Mining Company which damaged the business or property of Paul Gibbs and which were a violation of 29 U. S. C. A. sec. 158 (b) by reason of

(a) engaging in a strike of Grundy Mining Company Yes

Yes—No

(b) inducing or encouraging employees of Grundy Mining Company to engage in a strike or a refusal in the course of their employment to perform any services Yes

Yes—No

(c) threatening, coercing, or restraining Grundy Mining Company? Yes
Yes—No

(29 U. S. C. A. 158 (b)—It shall be unfair labor practice for a labor organization or its agents—

(4) (ii) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(B) forcing or requiring any person to cease . . . doing business with any other person . . .: **Provided**, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . ..)

(2) (If your answer to question 1 (a) (b) or (c) was "Yes") Was an object of the defendant or its agents to force or require Grundy Mining Company to cease doing business with Paul Gibbs (a) with respect to his contract of employment Yes (b) with respect to his truck hauling
Yes—No
contract? Yes
Yes—No

(3) (If your answer to question 1 (a) (b) or (c) was "Yes") Was such activity or conduct a primary strike or primary picketing of Grundy Mining Company? No
Yes—No

(4) (If your answer to question 1 (a) (b) or (c) and to question 2 (a) or (b) was "Yes," and if your answer to

question 3 was "No") Was Grundy Mining Company engaged in commerce or in an industry affecting commerce as these terms were defined in the charge of the Court? Yes

Yes—No

(5) Was there a wrongful interference with the plaintiff's contract of employment with Grundy Mining Company in violation of the common law of Tennessee? Yes

Yes—No

(6) Was there a wrongful interference with the plaintiff's coal hauling contract with Grundy Mining Company in violation of the common law of Tennessee? Yes

Yes—No

(7) (If your answer to either or both 5 or 6 was "Yes") Was the defendant a party to a conspiracy to commit the said wrongful interference? Yes

Yes—No

(8) (If your answer to question 1 (a) (b) or (c) and to questions 2 (a) and 4 was "Yes", and if your answer to question 3 was "No"; or of your answer to 5 was "Yes" and your answer to 7 was "Yes") What damages did the plaintiff sustain by reason of the loss of or interference with his employment contract with Grundy Mining Company? $60,000.00

(9) (If your answer to question 1 (a) (b) or (c) and to questions 2 (b) and 4 was "Yes", and if your answer to question 3 was "No"; or if your answer to 6 was "Yes" and your answer to 7 was "Yes") What damages did the plaintiff sustain by reason of the loss of or interference with his hauling contract with Grundy Mining Company? $14,500.00

(10) (If you have answered "Yes" to either 5 or 6, and if you have answered "Yes" to 7, and if you have awarded compensatory damages in either 8 or 9) Is the

plaintiff entitled to recover punitive damages from the defendant? Yes

Yes—No

(11) (If your answer to 10 is "Yes") We assess punitive damages against the defendant in the sum of $100,000.00.

GORDON M. HUNTLEY,
Foreman.

* * * * * * *

MOTION OF UNITED MINE WORKERS OF AMERICA FOR JUDGMENT IN ACCORDANCE WITH MOTION FOR DIRECTED VERDICT OR, IN THE ALTERNATIVE, MOTION FOR A NEW TRIAL—FILED NOVEMBER 23, 1962.

The defendant, United Mine Workers of America, moves the Court to set aside the verdict of the jury and to enter judgment in its favor in accordance with its motions for directed verdict on the following grounds and reasons:

1. Under the law and the state of the pleadings, this action cannot be maintained against the defendant, United Mine Workers of America, under Section 303 of the Labor Management Relations Act, 29 U. S. C., Section 187, as amended.

2. The evidence is insufficient in law to sustain a verdict for the plaintiff under Section 303 of the Labor Management Relations Act, 1947, as amended.

3. This Court is without jurisdiction to adjudicate the asserted cause of action predicated upon the law of the State of Tennessee.

4. The evidence is insufficient in law to sustain a verdict for the plaintiff under the law of the State of Tennessee.

Motion for Judgment, etc., or for New Trial

5. Under the applicable law and the proof in this record, plaintiff is not entitled to a judgment for

(a) damages based upon his alleged contract of employment with Grundy Mining Company;

(b) damages for the loss of his alleged haulage contract with Grundy Mining Company; or for

(c) punitive damages.

If the foregoing Motion be denied, the defendant, United Mine Workers of America, moves in the alternative that the verdict be set aside and that it be granted a new trial on the following grounds or reasons, among others:

1. The evidence is insufficient to sustain the verdict on any of the three items of damages on which judgment has been awarded.

2. The verdict is contrary to the weight of evidence.

3. There is not sufficient, in fact, there is no substantial evidence, to support the amount of the jury's award as to each of the items of damages for which the verdict was rendered.

4. The verdict manifests passion, prejudice and caprice and is the result thereof.

5. The amount of the verdict manifests passion, prejudice and caprice and is the result thereof as to each item of damages for which the verdict was rendered.

6. The amount of the verdict to the extent that it awarded punitive damages, manifests passion, prejudice and caprice and is the evident result thereof.

7. The verdict of the jury is contrary to the charge of the Court and to the law applicable to this case insofar as the jury found that defendant violated Section 303 of the Labor Management Relations Act, 1947, as amended, in that

(a) defendant's alleged activity relative to plaintiff was primary and not secondary in contemplation of that act;

(b) plaintiff, as an employee of the employer involved in the alleged labor dispute, was not harmed by any conduct prohibited by that section of said Act; and

(c) the various undertakings contemplated by plaintiff under his alleged contract of employment and haulage with Grundy Mining Company, were integrated with the operations of Grundy Mining Company to the extent that there were no primary and neutral employers or persons involved in the alleged labor dispute and therefore there was no violation of the Act.

8. The verdict of the jury, to the extent that it purports to have been predicated on the law of Tennessee, is void in that it is manifestly not predicated solely upon the direct consequences of violent conduct or threat thereof; and this Court is without jurisdiction in this case to enter judgment based on state law for other than the direct consequences of violent conduct or the threat thereof.

9. Plaintiff is not entitled to recover for alleged interference with his alleged contract of haulage with Grundy Mining Company in that performance of such contract by plaintiff would have been unlawful under the law of Tennessee.

10. The Court erred in admitting the testimony of the witness Beaumont relative to certain alleged events, said to have occurred on the evening of August 16-17, 1960, with reference to the movements of Paul Gibbs; with reference to the actual and contemplated production of mines opened in the Grays Creek area in 1962; with reference

to the fact that Grundy Mining Company did not employ Paul Gibbs in 1962 and the reason therefor.

11. The Court erred in admitting the testimony of the witness Callis concerning certain alleged events said to have occurred on August 17, 1960 in Palmer, Tennessee, and the actions of one M. L. Gary at or near a commissary; and in regard to the fact that Grundy Mining Company did not employ Paul Gibbs in 1962 and the reason therefor.

12. The Court erred in admitting the testimony of the witness Allison concerning certain alleged events said to have occurred on the evening of August 16, 1960 relative to the movements of Paul Gibbs; and of the fact that Gibbs was not employed by Grundy Mining Company in 1962 and the reason therefor.

13. The Court erred in admitting Exhibit 34 and also in failing to strike this exhibit on motion of the defendant.

14. A new trial should be directed because of the highly inflammatory and prejudicial closing argument made on behalf of the plaintiff and especially to that portion thereof which was wholly outside of the record. In particular, the following statements made by counsel are called to the attention of the Court:

(a) "You see, ladies and gentlemen, this is what started, what is known in this nation, as industrial warfare, and that is what they were doing over there. Now, what they are doing is what I call legal warfare. They will do what they please, the law doesn't mean (snaps fingers) that to them." . . .

(b) Now, on this conspiracy, certainly Mr. Kramer and Mr. Rayson, the able lawyers that they are, have done a magnificent job, but ladies and gentlemen, I point an accusing finger at that Mr. Owens because

it is his father who is the secretary-treasurer of the International, and this Mr. Owens is just as aware of what is taking place in this case as anyone could be after years and years of study, . . ."

(c) Now, what does the International do, how does it get these contracts, how does it get them? Ladies and gentlemen, you do it with shotguns, and you do it with fears that you've heard right here."

(d) Now, this poverty in the coal field that Mr. Kramer was talking about, the testimony in this record, and I think some of you know it from general knowledge, everybody in this courtroom is, and I'm sure should be, proud of the Tennessee Valley Authority, and the testimony in this record that some of this coal was going to be used by them. The Tennessee Valley Authority needs coal. We've got coal, and we've got men who want to work and mine coal. Now, who is the bugger? The bugger is the United Mine Workers of America, for the simple reason that they are going to pass work on their terms or else. And if a few people starve in the midst, what difference does that make . . ."

(e) Now, what this International Union has done, using these locals, has conspired to destroy that man, to bludgeon him, the same thing as taking a baseball bat and say we defy you, Paul Gibbs, to prove this case. We'll beat you to a bloody pulp before you are through. If we can't do it with shotguns, we'll use every legal means to do it, and we'll either bludgeon you out of this case or we'll starve you out, one of the two. Now, that is malicious, that's malicious, and you know we ask for $100,000 in punitive damages. Ladies and gentlemen, we don't ask for $99,999.99, we want $100,000, and I'll tell you why.

That is all we sued for, to start with, but in addition even if you awarded $100,000, they would chuckle in their sleeves and walk out of this courtroom and laugh. They will pay off the $100,000 and say, oh, well, so what. We've got mixed up, it cost us this much, now let's go back and do the same thing again. I give you my word that that is exactly what this Union is counting on."

(f) Certainly they want you to be light on them, so they can pay it back and go over there and blow up another mine, or conduct similar activities."

(g) Now, by your verdict you are going to put the stamp of approval on what this Union—yes, these locals—yes, what these locals did with the International's approval. You are going to say it is all right, and you have the approval, for armed mobs pulling people out of automobiles, shooting in the rear end of a car, conducting beatings, and putting economic pressure, the terrific power of the International Union, against one lone American, Mr. Gibbs. That will be your verdict if you turn this Union loose."

These portions of the Argument, and other similar parts of the Argument, taken in context with the whole were designed, outside of issues with which the jury was concerned, to arouse extreme resentment, passion and hostility towards defendant.

15. The learned Court erred in failing to give to the jury the following special request:

"You are further instructed that if you award to the plaintiff damages based upon interference with his employment as a supervisor or manager of the Grundy Mining Company mines such damages cannot

cover loss of such employment for a period of more than eight (8) months".

16. The learned Court erred in failing to give to the jury the following special request:

> "I further charge you that the secondary boycott provisions of the Taft-Hartley Act require the involvement of (1) an employer and (2) a second employee or person. This requirement of the Act is not met, however, where the second employer or person is neutral in the labor dispute as respects the position of the first employer in said dispute or where the second employer is acting as a part of the first employer's business."

17. The learned Court erred in failing to give to the jury the following special request:

> "I charge you that you may not find the defendant liable to the plaintiff under the state law unless you find that the International Union, through duly authorized individuals, engaged in acts of violence or threats of violence in breach of the peace relative to plaintiff's mine and trucking operations, and that such conduct damaged plaintiff."

18. The learned Court erred in failing to charge the jury as requested by defendant, that for the purpose of assessing punitive damages, the malice of an agent will not be imputed to the principal except in limited instances.

19. The Court erred in its charge to the jury with reference to primary picketing and secondary picketing solely in terms of the object of such picketing and did not consider the place or situs of the picketing.

20. The Court erred in its charge to the jury in failing to define what constitutes an agency agreement as to

whether or not the pickets and the defendant entered into such an agreement or whether the pickets were acting in their individual capacities or as representatives or agents of their local union.

Wherefore, defendant prays the Court for judgment notwithstanding the verdict of the jury or in the alternative for a new trial.

* * * * * * *

JUDGMENT—FILED NOVEMBER 27, 1962.

This cause came on for trial before the Court and a jury on the 7th day of November, 1962, and the succeeding days, and the jury having heard all of the evidence, the argument of counsel and the charge of the Court, and having considered of the case and of the special issues submitted to it by the Court, and having found that the plaintiff was entitled to have and recover of the defendant damages in the amount of Sixty Thousand Dollars ($60,000.00) by reason of loss or interference with his employment contract with Grundy Mining Company and the sum of Fourteen Thousand Five Hundred Dollars ($14,500.00) by reason of the loss of or interference with his hauling contract with Grundy Mining Company; and the jury having further found that the plaintiff is entitled to recover of the defendant punitive damages in the amount of One Hundred Thousand Dollars ($100,000.00);

It Is, Therefore, Hereby Ordered, Adjudged and Decreed that the plaintiff, Paul Gibbs, have and recover of the defendant, United Mine Workers of America, the total sum of One Hundred Seventy-four Thousand Five Hundred Dollars ($174,500.00) with interest thereon at the rate of six (6%) percent per annum from the date of this judgment until the same is paid, together with the costs of this action.

The Clerk of this Court is directed to pay the amount of this judgment to the law firm of Van Derveer, Brown & Siener, attorneys for the plaintiff, when said sum and its accrued interest thereon has been paid into the hands of the Clerk.

Approved for entry.

FRANK W. WILSON,
United States District Judge.

* * * * * * * *

OPINION—FILED JULY 18, 1963.

This case is now before the Court upon the motion of the defendant, United Mine Workers of America, for either a judgment notwithstanding the verdict or for a new trial. Upon trial of the case the jury found in response to special issues that the defendant, United Mine Workers of America, hereinafter referred to as "UMW", had violated the so-called secondary boycott provisions of the Taft-Hartley Act (29 U. S. C. 187) and had committed the tort of unlawful interference with the plaintiffs' contract rights, and awarded the plaintiff compensatory and punitive damages in the total sum of $174,500. Some of the background to this lawsuit is undisputed in the record and may be stated as follows. Tennessee Consolidated Coal Company, hereinafter referred to as "Consolidated", owns extensive coal lands in the Southeastern Tennessee Coal Fields and over a period of many years has engaged both directly in the mining of coal and in the leasing of coal lands to others to mine. Prior to March 15, 1960, Consolidated had operated a mine in Marion County, Tennessee, known as the Coal Valley Mine, this mine being operated under a collective bargaining agreement with the UMW. The Coal Valley Mine

was closed down by a strike upon that date when negotiation of a new collective bargaining contract failed after termination of the former contract by Consolidated in accordance with its terms.

In August of 1960 Grundy Mining Company, herein referred to as "Grundy", a wholly owned subsidiary of Consolidated, took steps to open new mines in the Gray's Creek Area of Marion County, Tennessee, within the general vicinity of the Coal Valley Mine and upon Consolidated coal lands. In preparation for opening these new mines Grundy agreed to employ Paul Gibbs, the plaintiff herein, as mine superintendent at a salary of $600 per month. At the same time Gibbs asked for the contract to haul the coal from the new mines at a price of 78¢ per ton and this was also agreed upon by the parties. Both the employment contract and the trucking contract were for an indefinite period. Gibbs' background was that of a coal operator and trucker.

Grundy proposed to open the new mine in the Gray's Creek Area without a contract with the UMW. Upon Monday, August 16, 1960, the first day work was scheduled to begin, Gibbs and a few others appeared for work, but picketing and a show of force took place by UMW members who were former employees of the Coal Valley Mine and no work was done. Violence or threatened violence continued the next day and all efforts by Grundy to open the mines in the Gray's Creek Area appear to have ceased after the second or third day. The picketing continued from August, 1960, until the following May, 1961. Gibbs drew one check of $300 under his salary agreement. He never got to haul any coal under his trucking contract with Grundy. In May of 1961 Consolidated contracted with a firm by the name of Allen & Garcia, an engineering firm, as operators to reopen the

Coal Valley Mine and this was done by Allen & Garcia under a collective bargaining agreement with UMW. This lawsuit was begun in August of 1961, but to carry events down to the time of the trial, it appears that the Coal Valley Mine continued in operation by Allen & Garcia under contract with the UMW until it was closed in the early summer of 1962 when a fault in the coal seam was struck. Thereupon Allen & Garcia opened a new mine in the Gray's Creek Area and moved the Coal Valley equipment and personnel to the new mine. In September of 1962 Allen & Garcia terminated its operating contract with Consolidated and gave notice of termination of the UMW contract. Grundy thereupon took over the Gray's Creek operation, and in addition opened some seven or eight hand loading mines in the area, but did not further employ Gibbs in any of these operations.

This lawsuit was begun upon August 23, 1961, when the plaintiff, Gibbs, filed suit herein against the UMW seeking to recover compensatory and punitive damages and alleging that UMW had violated Section 303 of the Taft-Hartley Act (29 U. S. C. 187) and was guilty of a common law conspiracy aimed at him. The case was tried by the plaintiff upon the theory that the UMW had directed its unlawful activities toward various coal operators with whom Gibbs had business dealings or with whom he anticipated doing business, including Grundy, Consolidated, Tennessee Products and Chemical Company, and one George Ramsey, in an alleged effort to cause them to cease doing business with him or to refuse to do business with him. At the conclusion of all of the evidence the Court concluded that the evidence was insufficient to warrant submitting to the jury the issues with reference to any losses sustained by the plaintiff by reason of any UMW activities directed toward in-

ducing Consolidated, Tennessee Products & Chemical Company and George Ramsey to either cease or refuse to do business with Gibbs, but rather that the case should be submitted to the jury only with reference to any compensatory or punitive damages the plaintiff might be entitled to recover by reason of UMW activities alleged to have been directed toward having Grundy terminate its employment contract and its trucking contract with Gibbs.

The case was submitted to the jury upon a number of special issues. The jury found all issues in favor of Gibbs and against the UMW and awarded compensatory damages to Gibbs in the sum of $60,000 for termination of his employment contract with Grundy, and in the sum of $14,500 for termination of his trucking contract with Grundy and awarded punitive damages to Gibbs in the sum of $100,000, for a total award of $174,500 to the plaintiff.

A number of grounds in the defendant's motion for a judgment notwithstanding the verdict, or in the alternative for a new trial, are directed toward alleged errors in the jury verdict in finding that the defendant violated the secondary boycott provisions of the Labor-Management Relations Act. It is the contention of the defendant in this regard that under the evidence in this case there either was no secondary boycott as a matter of law, or that the evidence preponderates against such a finding. It is the contention of the defendant that no violation by it of 29 U. S. C. 187 (Sec. 303 of the Labor-Management Relations Act as amended) was shown in the evidence as (1) there was no evidence that the defendant was responsible for the activity alleged to constitute a secondary boycott, and (2) any loss occasioned the plaintiff was at most the result of primary union activity

and not the result of any secondary activity for the reason that (a) such activity was limited to the premises of Grundy Mining Company, the employer with whom the dispute existed, (b) the object of the activity was clearly to further claimed job rights with Grundy, and not to induce Grundy to cease doing business with Gibbs, (c) the plaintiff, as mine superintendent for Grundy, was not such "other" or "neutral" person as to be the object of a proscribed secondary boycott, but rather was a part of Grundy, the primary employer.

Considering the defendant's contentions in the order stated above, the Court is of the opinion that there was sufficient evidence in the record to warrant submitting to the jury the issue of the defendant's responsibility for activity alleged to constitute secondary boycott. By stipulation UMW admits its responsibility for acts of its field representative, George Gilbert, performed in the scope of his employment. Without now determining whether the evidence was sufficient to permit a jury finding that UMW was responsible for the activities and violence testified to as having occurred in the Gray's Creek Area upon August 15 and 16, 1960, it appears undisputed that the UMW became aware of such activities by the 16th. There is evidence upon which the jury could find that thereafter Gilbert participated in and supported, if not controlled, the picketing that occurred. The witness, Swope, testified that George Gilbert gave instructions to the pickets to permit Swope to pass through the picket lines. The witnesses, Gibbs, Campbell, and Higgins, each testified to conversations with George Gilbert during the course of the picketing indicating his support of the picketing and his direction of union activities toward the end of preventing Gibbs from working for Grundy or from bringing into the Gray's Creek Area

the Southern Labor Union, a competitive union. Whether Gilbert or the UMW was or was not responsible for any violence or threats of violence that may have occurred either before or after August 16 is not controlling on the issue of secondary boycott, as it is the object of the union activity that constitutes the essence of the unfair labor practice involved in a proscribed secondary boycott. As stated in the case of **NLRB v. International Rice Milling Co.**, 341 U. S. 665 at 672:

> ". . . Violence on the picket line is not material (and) . . . would not in itself bring the complained of conduct into conflict with Section 8 (b) (4). It is the object of union encouragement that is proscribed . . . rather than the means adopted to make it felt."

The UMW next contends that Gibbs' loss of employment and loss of his trucking contract would at most be the result of primary union activity directed toward Grundy, and therefore not actionable under 29 U. S. C. 187, as the union activity was limited to the premises of Grundy. In support of its position in this regard, the defendant relies principally upon the case of **Electrical Workers v. Labor Board** (cited as **Local 761 v. NLRB**), 366 U. S. 667, which it is contended holds that picketing at the situs of the primary employer does not violate the secondary boycott provisions of Sec. 8 (b) (4) (A) of the National Labor Relations Act [29 U. S. C. 158 (b) (4) (A)]. It is believed by the Court that the holding in the **Electrical Workers** case is not controlling under the facts and circumstances of the principal case. That case involved a review of a National Labor Relations Board decision that held that picketing of the primary employer, General Electric Company, that extended to a gate not used by employees of the primary employer, but which was rather used only by employees of inde-

pendent contractors of General Electric Company, was an unfair labor practice under Sec. 8 (b) (4) (A) in a labor dispute between the union and General Electric Company. The Supreme Court affirmed this holding with the proviso that should it be made to appear that the independent contractors' employees performed work to a substantial extent that contributed to the normal operations of General Electric Company, then the picketing of such employees' gate would not constitute an unfair labor practice. In distinguishing the case it must be remembered that a Board decision and not a jury verdict was there involved and the appellate review is not the same. Even if the **Electrical Workers** opinion were, as contended by UMW, authority for the proposition that picketing at the situs of the primary employer could not constitute a Sec. 8 (a) (4) (B) unfair labor practice though it had a secondary effect upon others, this is not decisive of the issues in the principal case. No issue was involved in the **Electrical Workers** case but that General Electric was the object of the primary activity, whereas whether Grundy was the object of primary or secondary activity or both is one of the disputed issues in the principal case. No issue was there involved but that all union activity occurred on the premises of General Electric Company, the primary employer, whereas the activity complained of in the principal case occurred at various places at various times. The statement in the **Electrical Workers** case that "the distinction between legitimate 'primary activity' and banned 'secondary activity' does not present a glaringly bright light" is an effective understatement of the complex and vague wording of the sections of the Act here involved. The Court there likewise pointed out that the meaning of the secondary boycott provisions of the Act must be worked out with reference to the facts of a particular case rather

than in the statement of all-inclusive principles when it stated:

> "The nature of the problem, as revealed by unfolded variant situations, inevitably involves an evolutionary process for its rational response, not a quick, definitive formula as a comprehensive answer."

While the situs of the union activity would be evidence which the Jury might properly consider in determining the object of such activity, where the object is in issue, the situs is not itself controlling in establishing a secondary boycott.

The essence of the statutory language pertinent to the issues of this lawsuit, when stripped of all non-applicable phrases and when stripped of references to interstate commerce, is as follows:

> "(b) It shall be an unfair labor practice for a labor organization or its agents . . .
>
> "(4) (i) to engage in or to induce or encourage any individual . . . to engage in, a strike or refusal in the course of his employment . . . to perform any services or (ii) to threaten, coerce, or restrain any person . . ., where in either case an object thereof is
>
> (B) forcing or requiring any person to . . . cease doing business with any other person . . . provided that nothing contained in this clause (b) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . ."

When viewed in its essence, it is apparent that the specified union activity becomes unlawful and therefore actionable as a secondary boycott, when an **object** of such union activity is to force or require any person to cease doing business with any other person, provided that the

activity is not a primary strike or primary picketing, having only an incidental or secondary effect upon the other person. In this regard it is necessary to distinguish between primary activity having a secondary effect upon others, which is not actionable,[1] and activities directed toward one person and having as an object the causing of that person to cease doing business with another person with whom a primary labor dispute exists, which is actionable.[2]

The UMW next contends that under the facts of the principal case any union activity would in no event be actionable under 29 U. S. C. 187, as the object of the activity was clearly to further claimed job rights with Grundy, and not to induce Grundy to cease doing business with Gibbs. As stated above in discussing the issue of UMW's responsibility for any activity, the witnesses, Gibbs, Campbell, and Higgins, each testified to statements having been made by George Gilbert that would indicate that his purpose or object was to prevent Gibbs from working for Grundy or from bringing into the Gray's Creek Area the Southern Labor Union. This evidence would support the jury verdict when it found that an object of the union activity was to cause Grundy to cease doing business with Gibbs with respect to both his employment contract and his trucking contract. The fact that the union may have had some object or objects other than and in addition to causing Grundy to cease

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1 **Electrical Workers v. Labor Board**, 366 U. S. 667 (1961); **Seafarers International Union v. NLRB**, 265 F. 2d 585 (D. C. Cir., 1959).

2 **United Mine Workers of America v. Meadow Creek Coal Co.**, 263 F. 2d 52 (C. C. A. 6, 1959) cert. denied 359 U. S. 1013; **United Mine Workers of America v. Osborne Mining Co.**, 279 F. 2d 716 (C. C. A. 6, 1960) cert. denied 364 U. S. 881; **Gilchrest v. United Mine Workers of America**, 290 F. 2d 36 (C. C. A. 6, 1961) cert. denied 368 U. S. 875; **Flame Coal Co. v. United Mine Workers of America**, 303 F. 2d 39 (C. C. A. 6, 1962); **Sunfire Coal Co. v. United Mine Workers of America**, 313 F. 2d 108 (C. C. A. 6, 1963); **White Oak Coal Co., Inc. v. United Mine Workers of America** (Opinion May 24, 1963), ... F. 2d ... (C. C. A. 6, 1963); **Joe R. Allen et al. v. United Mine Workers of America** (Opinion June 26, 1963), ... F. 2d ... (C. C. A. 6, 1963).

doing business with Gibbs would not prevent the activity from constituting a secondary boycott insofar as Gibbs was concerned, and therefore actionable by him as such. As stated in the case of **Flame Coal Co. v. UMW**, 303 F. 2d 39 (C. C. A. 6, 1962).

> "This union cannot escape the charge of secondary boycott because it chose to attack on all fronts at once, claiming its desire and objective to be the organization of all involved, whether producers, transporters, or processers of coal. **United Mine Workers of America v. Osborne Mining Co.**, 279 F. 2d 716, 723."

Finally, upon the issue of secondary boycott it is contended by the defendant that any union activity here involved would in no event constitute an actionable secondary boycott as to Gibbs for the reason that, as mine superintendent for Grundy, he was not such an "other person" within the contemplation of Sec. 8 (b) (4) (B) as to be the object or victim of a proscribed secondary boycott, but rather he was a part of Grundy, the primary employer. The relationship of Gibbs to Grundy, namely that he was hired as mine superintendent for Grundy and as a contract coal hauler, is undisputed in the record. Therefore, whether he or is not such "other person", the ceasing of business with whom may constitute an actionable secondary boycott, is a question of law.

If the language of the statute is to be literally interpreted, then Gibbs is clearly an "other person" from Grundy, as would be any officer or employee of Grundy. However, as stated in **Electrical Workers v. Labor Board**, 366 U. S. 667:

> "This provision could not be literally construed; otherwise it would ban most strikes historically considered to be lawful, so-called primary activity."

Likewise, as noted in **Seafarers International Union v. NLRB** (1959), 265 F. 2d 585, when read literally, the Act would outlaw picketing at the primary employer's premises so that the language must be construed in the light Congressional intent and in the light of the proviso that nothing in the Act shall be construed to make any primary strike or primary picketing unlawful.

In support of its contention that Gibbs is not such "other person" from Grundy as to be the object of a secondary boycott for activities directed at Grundy, the defendant relies principally upon the case of **Seeley v. Brotherhood of Painters**, 308 F. 2d 52 (5 C. C. A., 1962). In that case the plaintiff, in one of several counts, alleged that he had a cause of action against the defendant union under 29 U. S. C. 187, in that the defendant caused the plaintiff's employer to discharge him. The Court, in holding that the count failed to state a cause of action, stated that discharging an employee did not constitute "ceasing to do business with any other person," stating further, "We do not think the relation of employer and employee, including one employed as a supervisor, is that of 'any other person' within Section 158 (b) (4)." The Court reached this conclusion on the ground that "no secondary boycott was involved in this case," which is rather unsatisfactory reasoning in that it begs the question.

The defendant relies upon other authority as requiring that the plaintiff be a "neutral" before he is entitled to the benefit of the statutory secondary boycott action.[3] That this is not an accurate statement of law is apparent when it is recalled that 29 U. S. C. 187 (b) provides that

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3 **Truck Drivers and H. Local 728 v. Empire State Express**, 293 F. 2d 414 (5 C. C. A. 1961) cert. denied 368 U. S. 931 (1961); **Building Service Employees v. NLRB**, 313 F. 2d 880 (D. C. Cir., 1963); **International Brotherhood of Electrical Workers v. NLRB**, 181 F. 2d 34 (C. C. A. 2, 1950).

"**whoever** shall be injured" by a secondary boycott may recover, including the employer with whom the primary dispute exists.[4] While the word "neutral" may be useful in identifying a case of secondary boycott in a clear and classical case of secondary boycott, little help is needed in identifying a clear and classical secondary boycott. The word "neutral" can be misleading in other situations, as for example where the union strikes on all fronts at once, as was the case in **Flame Coal Co. v. United Mine Workers of America**, 303 F. 2d 39 (C. C. A. 6, 1962), where the Court held that such union activity did not escape the charge of secondary boycott. If two employers each simultaneously has a dispute with the same union, they may be neutral as to each other's dispute, but they are in no sense neutral as to the union.

While a correct result may have been reached in each of the foregoing cases relied upon by the defendant as authority for excluding an employee or supervisor from the meaning of "other person" in Sec. 8 (b) (4) (B), the reasons given for reaching such conclusion are often unsatisfactory. Reference to the full wording of the section will more properly reveal the meaning that must necessarily be placed upon the words "other person". When it is noted that the proviso expressly excludes primary strikes and primary picketing, it is apparent that employees and supervisors of any struck or picketed primary employer who may lose their employment are not within the meaning of "other persons" and would have no statutory action for any loss so occasioned.

It is apparent from the foregoing that Gibbs, in his capacity as mine superintendent for Grundy, would not be an "other person" as those words are used in the statute. Although, as found by the jury, an object of the picketing of Grundy was to cause it to cease employment

4 See cases cited in Footnote No. 2, *supra*.

of Gibbs, and Grundy may have been "neutral" or secondary to the dispute between UMW and Gibbs, there also clearly existed a primary dispute between UMW and Grundy. It follows that the verdict of the jury awarding damages to Gibbs upon his statutory claim for loss of employment must be set aside.

It does not necessarily follow, however, that, even though Gibbs in his capacity as a mine superintendent and in his claim for loss of employment is not an "other person" from Grundy, that he is therefore in his capacity as a coal trucker and in his claim for loss of the trucking contract not an "other person" from Grundy. The evidence is undisputed that Gibbs was an independent trucker engaged in this business with and for persons and companies other than Grundy. He did not work only for Grundy in this respect. It would therefore appear that in his capacity as an independent trucker he would be an "other person" from Grundy and would be entitled to a statutory action under the secondary boycott law upon this claim.

Having determined that the jury verdict should be sustained as to the statutory cause of action for loss by Gibbs of his trucking contract, it would follow that the defendant's contention that the Court was without jurisdiction of the common law conspiracy action must fail.[5] Even though the federal statutory action should fail both upon the employment and the trucking claim, it cannot be said that the federal question was plainly wanting in substance. Under these circumstances, in accordance with the case of **Hurn v. Cursler**, 289 U. S. 238, the Court would retain jurisdiction to dispose of the non-federal common law claim.

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5 **United Mine Workers of America v. Meadow Creek Coal Co.**, 263 F. 2d 52 (C. C. A. 6, 1959) cert. denied 359 U. S. 1013; **Flame Coal Co. v. United Mine Workers of America**, 303 F. 2d 39 (C. C. A. 6, 1962).

Another series of grounds in the defendant's motion for a judgment n.o.v. or a new trial are directed toward alleged errors in the jury verdict in finding that the defendant conspired to wrongfully interfere with the plaintiff's employment contract and coal hauling contract with Grundy. It is the contention of the defendant in this regard that the evidence fails to support the jury verdict, particularly in view of the legal principles that (a) the evidence must be clear and convincing for a labor union to be held responsible in a federal court action, in view of Section 6 of the Norris-Laguardia Act; (b) a union is under no legal obligation to disavow unlawful acts of its members; (c) welfare assistance given members, including pickets, by the union does not constitute ratification of any unlawful conduct by such members or pickets; and (d) federal law has preempted the field of non-violent picketing so that no verdict could be awarded upon a state common law conspiracy charge not based on violence. The jury was correctly charged upon all of these matters. The Court is of the opinion that there is evidence in the record, when the testimony is viewed as a whole, to support the verdict of the jury in this respect. The contention that 29 U. S. C. 187 and the other provisions of the National Labor-Management Relations Act preempted the field of labor controversy or precluded any common law action of conspiracy has been decided against the UMW in several cases in this circuit, the most recent being the case of **White Oak Coal Co. v. United Mine Workers of America**, ... F. 2d ... (C. C. A. 6, decided May 24, 1963). Moreover, there was evidence of violence, threats of violence, and mass picketing, any of which was such unlawful conduct as to support a verdict based upon common law conspiracy.

A further series of errors alleged by the defendant are directed to the Court's charge to the jury. It is the con-

tention of the defendant that the Court was in error in declining a special request of the defendant relating to a requirement that a neutral exist before an actionable secondary boycott would exist. The Court has hereinabove dealt with the possible misleading nature of the word "neutral" when used in defining a Sec. 8 (b) (4) unfair labor practice. It is believed that the charge as given correctly defined the statutory claim. Moreover, the action of the Court in setting aside the jury verdict on the statutory claim of interference with the plaintiff's employment contract would render this ground of the defendant's motion moot. The other alleged errors in the charge were matters not raised at the time of the trial as required by Rule 51, Federal Rules of Civil Procedure. It is believed that in any event no error was committed in the matters complained of.

A further ground for new trial relied upon by the defendant is the alleged improper argument of the plaintiff's counsel in his closing argument. Among other remarks, counsel for the plaintiff accused the defendant of not caring a snap of the fingers for the law and of attempts to bludgeon or starve his client out of the lawsuit. The Court is of the opinion that the argument was improper. While an advocate may share his client's prejudices against an adversary, he cannot properly share them with the jury, particularly when they do not relate to any matters in evidence. However, the Court is of the opinion that the argument was not so prejudicial as to warrant a new trial, but should rather be taken into consideration by the Court upon the issue of excessiveness of the verdict.

Further grounds relied upon by defendant in its motion relate to the alleged lack of evidence on the issue of damage and the alleged excessiveness of the verdict in this respect. The only evidence in the record that might

support any recovery of damage with reference to the loss of the plaintiff's trucking contract was the plaintiff's own estimate of the profit he would have made on the contract, as set forth in Plaintiff's Exhibit No. 34, in the amount of $14,029. His actual experience in the coal trucking business reflected substantial losses, rather than profits, for preceding years. Not only is there an absence of credible evidence to support the estimate but the estimate is admittedly based upon carrying loads substantially in excess of the permissible weight limits applicable to the plaintiff's trucks under the laws of Tennessee. The issue here is not the validity or invalidity of the coal hauling contract, or the right of a third party, the UMW, to assert its invalidity, as apparently argued in the plaintiff's brief. The issue here is as to the probative value of the evidence of the loss of prospective profits when based upon prospective violation of truck weight laws. The Court is of the opinion that such evidence has no probative value.[6] Under these circumstances the record is devoid of any evidence upon which a jury might return a verdict awarding any damages for loss by the plaintiff of his trucking contract and the defendant's motion for a directed verdict upon this issue made at the conclusion of the evidence should have been sustained.

With respect to the verdict awarding damages unto the plaintiff for loss of his employment contract, the Court is of the opinion that there is evidence in the record upon which a verdict might be sustained. However, without here reviewing the evidence relating to damages sustained by reason of loss of the employment contract, other than to note that the employment contract was terminable at will by either party, the Court is of the opinion that the verdict of the jury upon this

[6] **Shelley v. Hart**, 297 P. 82 (Calif., 1931). See also 25 C. J. S., **Damages**, Sec. 42 (B) and 15 Am. Jur., **Damages**, Secs. 158, 159.

issue is clearly excessive to the extent of $30,000. Likewise in reviewing the evidence and reflecting upon the argument of the plaintiff's counsel to the jury, the Court is of the opinion that the jury verdict upon the issue of punitive damages is clearly excessive to the extent of $55,000. A remittitur in the sum of $30,000 upon the issue of loss of the plaintiff's employment contract and in the sum of $55,000 upon the issue of punitive damages is therefore suggested, or otherwise a new trial will be ordered.

The Court has reviewed Grounds 10, 11, 12, and 13 of the defendant's motion relating to the admissibility of various items of evidence upon the trial, and is of the opinion that these grounds are without merit and should be overruled.

It therefore results that the verdict of the jury in favor of the plaintiff on the issue of loss of the plaintiff's employment contract by reason of a statutory secondary boycott will be set aside. The verdict of the jury awarding damages unto the plaintiff on the issue of loss of the plaintiff's trucking contract by reason of both a statutory secondary boycott and a common law conspiracy will be set aside. The defendant's motion for a judgment n.o.v. upon these issues should be sustained. Unless the plaintiff shall agree to accept a remittitur of $30,000 in the jury verdict on the issue of damages by reason of loss of the plaintiff's employment contract as a result of a common law conspiracy and to accept a remittitur of $55,000 in the jury verdict on the issue of punitive damages, the Court believes that these issues should be submitted to another jury and a new trial will be ordered.

An order will enter accordingly.

FRANK W. WILSON,
United States District Judge.

JUDGMENT—FILED AUGUST 28, 1963.

This cause having heretofore been heard by the Court on the motion of the defendant, United Mine Workers of America, for a judgment notwithstanding the verdict of the jury and in the alternative for a new trial, and the Court having fully considered said motion and each ground thereof hath filed herein its Opinion setting forth fully the conclusions reached, which Opinion is made a part of the record in this case.

It is accordingly Ordered, Adjudged and Decreed that the defendant's motion for judgment n. o. v. on the issue of the loss of plaintiff's trucking contract, which issue is based upon alleged statutory secondary boycott and also upon alleged common law conspiracy, be and the same is hereby sustained and the judgment heretofore entered is accordingly modified so as to eliminate therefrom the award of $14,500.00 made by the jury to the plaintiff on the aforesaid claim of loss on his trucking contract.

It is Further Ordered, Adjudged and Decreed that, in accordance with said Opinion, the defendant's motion for judgment n. o. v. on the issue of loss of plaintiff's employment contract be and the same is hereby sustained insofar as said motion is directed to the assertion of said claim upon the basis of secondary boycott but said motion for judgment n. o. v. on this issue is overruled insofar as this claim is based upon alleged common law conspiracy.

The Court is further of the opinion and for the reasons set forth in its said Opinion doth find and decree that the verdict of the jury in awarding $60,000.00 to the plaintiff for loss on his employment contract is clearly excessive to the extent of $30,000.00, and is also of the opinion and for the reasons set forth in its Opinion doth find and decree that upon the issue of punitive damages the ver-

dict of the jury is clearly excessive to the extent of $55,000.00. Accordingly, a remittitur in the sum of $30,000.00 upon the issue of loss in connection with the plaintiff's employment contract, and a remittitur in the sum of $55,000.00 upon the issue of punitive damages is suggested.

The plaintiff has now filed a written acceptance of the suggested remittitur. It is therefore Ordered, Adjudged and Decreed that the plaintiff, Paul Gibbs, have and recover of the defendant, United Mine Workers of America, the sum of $75,000.00 with interest thereon at the rate of 6% per annum from and after the date of entry of this judgment.

The various grounds of the motion for judgment n. o. v. and for new trial are referred to in this judgment and overruled as shown in the Opinion of the Court filed herein.

The clerk of this court is directed to pay the amount of this judgment unto the plaintiff and the law firm of VanDerveer, Brown & Siener, attorneys for the plaintiff, when the said sum and its accrued interest thereon have been paid into the hands of the clerk of this court.

Approved for Entry.

FRANK W. WILSON,
United States District Judge.

Civil

Filed Aug. 26, 1963.

Ent'd. Order Bk. 17, pp. 276, 277.

JAMES W. PARROTT, Clerk,
By HATTIE SAULPAW, Dep. Clk.

* * * * * * *

**CONSENT TO REDUCE VERDICT—
FILED AUGUST 26, 1963.**

Comes Paul Gibbs, the plaintiff in the above styled action, by and through his attorneys, Van Derveer, Brown & Siener, and accepts the remittitur suggested by the Court in its Memorandum Opinion filed July 18, 1963, and consents that the verdict of One Hundred Seventy-Four Thousand Five Hundred Dollars ($174,500.00) rendered in favor of the plaintiff and against the defendant may be reduced to the sum of Seventy Five Thousand Dollars ($75,000.00).

VAN DERVEER, BROWN & SIENER,
By: JOE VAN DERVEER.

* * * * * * *

ORDER—FILED SEPTEMBER 4, 1963.

Upon it being made to appear to the Court in this cause that a clerical error was made in entering the judgment herein under date of August 26, 1963, whereby the next to the last paragraph of the judgment reads as follows:

> "The various grounds of the motion for judgment n. o. v. and for new trial are referred to in this judgment and overruled as shown in the Opinion of the Court filed herein."

and the same should be corrected to read as follows:

> "The various grounds of the motion for judgment n. o. v. and for new trial not referred to in this judgment are overruled as shown in the opinion of the Court filed herein."

It is therefore Ordered that the next to the last paragraph of the judgment entered in this cause under date of August 26, 1963 be corrected to read as follows:

Notice of Appeal by Defendant

"The various grounds of the motion for judgment n. o. v. and for new trial not referred to in this judgment are overruled as shown in the opinion of the Court filed herein."

Approved for Entry.

FRANK W. WILSON,
United States District Judge.

* * * * * * *

NOTICE OF APPEAL—FILED SEPTEMBER 24, 1963.

Notice is hereby given that the United Mine Workers of America, the defendant in the above-styled case, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the judgment entered on November 27, 1962, and from the judgment overruling the defendant's motion for judgment notwithstanding the verdict and defendant's alternative motion for a new trial, which judgment was entered in this action on August 26, 1963, and thereafter modified by order dated September 4, 1963, to correct a clerical error.

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R. R. KRAMER,
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Knoxville, Tennessee,
Attorneys for Defendant, United Mine Workers of America.

* * * * * * *

NOTICE OF APPEAL—FILED SEPTEMBER 25, 1963.

Notice Is Hereby Given that Paul Gibbs, the plaintiff in the above-styled case, hereby appeals to the Circuit Court of Appeals for the Sixth Circuit, from the final judgment entered in this action on the 26th day of August, 1963.

This 25th day of September, 1963.

VAN DERVEER, BROWN & SIENER,
By: JOE VAN DERVEER,
The James Building,
Chattanooga, Tennessee.

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SUMMARY OF PROCEEDINGS IN CHAMBERS.

Gibbs v. U. M. W. A.—U. S. D. C., E. D. Tenn., S. D. No. 3771.

11/ 7/62 Conference in Chambers prior to the beginning of the trial. (Not reported.)

" Conference in Chambers following swearing of the jury. (Not reported.)

" Conference in Chambers at the end of Mr. Gibbs' testimony (first appearance) with regard to Mr. Kramer's objection to admission of Exhibits P-13 and P-14. Motion heard and argued. Ruling: Exhibits 13 and 14 admitted and allowed to be filed.

" Conference in Chambers prior to beginning of the afternoon session. (Not reported.)

11/ 9/62 Conference in Chambers following testimony of Mr. Gibbs, re:

1st, with respect to defendant's objection to the admission of Exhibits P-27 and P-28 (objection heard and argued). The Court said:

> "I think in this instance, on these two exhibits, 27 and 28, that the objection of the defendant should be sustained, at least to this extent, and that is that any projection of profit from the hauling contract should be limited to the coal for which there has been established a market in the proof, not to the productive capacity. . . . So what I am saying is that you will be permitted to make a projection such as this, to the limit of 35,000 tons, but beyond 35,000 tons I feel that it is too speculative to allow the jury to consider it. Now as to the other grounds of the objection, some of them I think should be developed in cross-examination as to the question of the accuracy of the cost that they have deducted."

2nd, with respect to defendant's motion with regard to the absence of evidence as to plaintiff's obtaining State certificate as a coal-hauling contractor. (Motion heard and argued.) The Court said:

> "As to the legal questions that you have raised about the statute, the certificate of a contract hauler, I think that is a matter that we can give careful attention to after the trial, and it should not prevent the plaintiff from going forward at this time."

11/ 9/62 3rd, with respect to defendant's objection to the admission of Exhibit P-33 on the issue of future

profits or damages based on any Taft-Hartley violation. (Objection heard and argued.) The Court said:

> "Of course, I understand your objection at this point to this exhibit is based upon the proposition that there is no evidence in the record from which there could be a jury issue on any Taft-Hartley violation or any conspiracy that caused the termination of these leases; therefore any evidence on this issue is not material. Now, if you have any other basis for objecting . . ."

Mr. Kramer: Yes, we do, your Honor. (Further argument heard.) The Court said:

> "All right. Well, I believe the objection to the Exhibit P-33 should be overruled, and we will proceed accordingly. Again, we can always pass on this problem at the time we consider what issues we submit to the jury."

(See Appendix B.)

11/13/62 Conference in Chambers at 8:00 a. m. prior to the resumption of the trial in open court, re:

1st, Mr. Kramer's motion to dismiss the entire action, first, on jurisdictional grounds, etc. (Motion heard and argued.) The Court said:

> "All right. With respect to the overall motion of the defendant, I feel the Court should overrule the motion. Now, with respect to those four possible bases of having a secondary boycott—in other words, I'm in a quandary here whether by ruling on the motion with respect to the overall motion you have made, whether I am at the same time

ruling upon the possible existence under the proof of all four of the suggested boycotts."

Mr. Kramer: May it please the Court, your Honor might reach some such conclusion. I have four additional motions reaching each of these possible . . .

The Court: Well, I think that I shall overrule the motion of the defendant with respect to there being no jurisdiction, either alleged or established in the proof, of any—by any violation of the Taft-Hartley Act.

2nd, Mr. Kramer's motions with reference to whether or not a secondary boycott existed as to George Ramsay, Grundy Mining Co., Tennessee Consolidated, and Tennessee Products. (Motions heard and argued.) The Court said:

"Its the opinion of the Court that the evidence does not establish that a violation—there's no evidence upon which a jury might find that a violation of the Taft-Hartley Act existed insofar as George Ramsay was concerned. . . . So that motion will be sustained insofar as the secondary boycott is claimed toward George Ramsay (C-7-23).

"Well, with respect to the motion insofar as Tennessee Products is concerned, I believe the motion should be sustained (D-3-23) . . . Any conclusion by the jury on either of those issues, it seems to me, would have to be speculation. I believe the motion should be sustained (D-4-22).

"I am unable to see where there is any evidence in the record that would warrant sub-

mitting the case on the issue of damages as to the Tennessee Consolidated (D-11-7).

"I believe, however, as to that motion, unless there is something further on it, that the motion as to Grundy (Mining Co.) should be overruled and the jury can be ready to pass upon the question—as to whether or not there was a secondary boycott, as to whether or not there was a conspiracy, as to whether or not there were damages" (E-3-19).

11/13/62 Also, at this conference in Chambers, special requests to charge were discussed, and the ruling of the Court as to each request was noted thereon by the Court.

Also at this conference, the matter of the form of the verdict was discussed and resolved.

11/14/62 Conference in Chambers following charge re requests for additional requests to charge. See Ap. F for verbatim report of the conference proceedings.

HEARING IN CHAMBERS NOVEMBER 13, 1962.

• • • • • • • •

1* Mr. Kramer: May it please the Court, the defendant moves to dismiss this entire action because in this case jurisdiction of this court is based entirely upon the alleged violation of the Taft-Hartley Act. And the plaintiff has not asserted a substantial cause of action either in the pleadings or under the proof under this Taft-Hartley Act. And jurisdiction of the Court to hear and determine the alleged cause of action based upon plain violation of the

* Numbers appearing in outer edge of text indicate page numbers of original stenographic transcript of testimony.

Tennessee common or statutory law, that it is based upon conspiracy, if existing, is based upon the theory of ancillary or pendant jurisdiction, and such jurisdiction does not and cannot exist in this case in as much as the substantial cause of action under the federal act is not here asserted either in the pleadings or in the proof. And this motion goes to the dismissal of the entire cause or case.

The Court: Now that motion is based upon both the pleading and on the proof?

Mr. Kramer: It is, your Honor.

The Court: . . . the jurisdiction.

Mr. Kramer: We heretofore had the motion on the
2 pleadings alone. And it is now based upon both.

The Court: All right.

* * * * * * * *

7 The Court: If not, it's the opinion of the Court that the evidence does not establish that a violation—there's no evidence upon which a jury might find that a violation of the Taft-Hartley Act existed in so far as George Ramsey was concerned. First, in that there is no evidence upon which the jury might find that the Union activity was directed toward Ramsey in violation of the Act. And second, there is no evidence of any legally established damages or injuries. The prospective loss of contracts or haulage agreements which never had in fact existed would be so speculative, so remote, as to not to establish any issue that the jury could pass on with regard to damages, it seems to me. So that the motion will be sustained in so far as the secondary boycott is claimed toward George Ramsey. All right.

Mr. Kramer: Our next motion, your Honor, is to the same effect and directed to the claim of the secondary boycott against Tennessee Products and Chemical Company. We do not think there is a sufficient affirmant in the

pleadings and that the proof does not establish a basis upon which a jury could find that a secondary boycott was directed toward Tennessee Products and Chemical Company.

* * * * * * *

3 The Court: Well, with respect to the motion in so far as Tennessee Products is concerned, I believe the motion should be sustained. It seems to me that—I can't recall any evidence in the case which would form a
4 basis in the evidence for concluding that first, that the termination of the leases were as a result of the Union activity directed toward Tennessee Products. There is nothing in the record, it seems to me, other than just pure speculation as to why the lease may have been terminated in January, or a lease may have been terminated in January. At any rate, it's my recollection of the testimony that attempted termination was not in fact accomplished, and when the termination was actually accomplished, it was accomplished by Mr. Human, whose testimony was rather definite and positive that it was terminated for reasons other than Union activity. It seems to me, too, that the problem of damages here is so speculative and so uncertain. One of these mines had been—the testimony appears to be clear—had been worked out. The only evidence of production or potential profits was a record that was introduced of an operation more than a year prior to that time. There's no evidence in the record whatsoever of what the profit or loss experience was at a time reasonably close to the time when it's contended that the lease or leases were terminated. I don't see how the jury could find that, first, there was a termination by reason of unlawful union activity on basis of the evidence in the record, nor do I see how they could find any damages. Any conclusion by the jury on either of those issues, it seems to me, would have

to be speculation. I believe the motion should be sustained. All right.

Mr. Kramer: We have a similar motion, your Honor, as to Tennessee Consolidated Coal Company. I am trying to think that we not consider Tennessee Consolidated and a similar motion as to Grundy made separately, but considered together at this time in the hope of saving a little time, and . . .

The Court: Well, I really wonder if we would. Yes, I can tell you quite frankly what's concerning me and then the plaintiff can respond. On the Tennessee Consolidated, I am unable to see where there is any proof of any damage in the record so far as Tennessee Consolidated. What is contended is that Tennessee Consolidated did not give him further leases or further work. Wherein is that an actionable damage—the failure to give a prospective lease or prospective employment in the future. I'm not aware of that being a legally actionable element of damage. Now, do you have any authority for a proposition? This was not a situation, so far as Tennessee Consolidated was concerned, and under the record in this case where an existing contract or an existing right was interfered with, but rather the testimony could only establish that a prospective right or a prospective lease of property, or prospective employment was interfered with.

* * * * * * * *

The Court: Well, anything further? Without at this time passing on the question as to whether there is evidence to go to the jury on the actions of the Union in so far as it may or may not have been directed toward Tennessee Consolidated, as the Court reads the cases, not only the cases that are referred to in the plaintiff's brief with respect to similar actions, such as this, against United Mine Workers, but other cases, I am unable to see where

there is any evidence in the record that would warrant submitting the case on the issue of damages as to the defendant, Tennessee Consolidated. I believe the motion should be sustained as to Tennessee Consolidated.

* * * * * * * *

3 The Court: Except for the fact that we are, as you know, running a little bit on time this morning, I would want to give you every opportunity to debate the matter fully, because it's very helpful to me for you all to state your position. This is not an easy case. It's difficult. It's difficult to keep everything in mind at one time. There are so many different elements to it. I believe, however, as to that motion, unless there is something further on it, that the motion as to Grundy should be overruled and the jury can be ready to pass upon the question—as to whether or not there was a secondary boycott, as to whether or not there was a conspiracy, as to whether or not there were damages.

Mr. Kramer: Now, your Honor, I do want to make
4 another motion.

The Court: All right.

Mr. Kramer: We move to dismiss the portion of this suit that is based upon an alleged common law conspiracy arising under the state statute, because the facts necessary . . .

The Court: The state statutes?

Mr. Kramer: The state statutes—or state law. The state law. In other words, the conspiracy portion of the claim which was based not on secondary boycott but on common law. That is a separate cause of action. The factual situation is not identical with the factual situation that is involved in the secondary boycott, and we respectfully insist that ancillary or pendant jurisdiction could not attach to a secondary boycott claim or a violation of

the Taft-Hartley so as to give this court jurisdiction of this claim. It's separate and independent, and ancillary or pendant jurisdiction principles should not carry that case into and part of the jurisdiction of the federal court.

The Court: All right.

Mr. Kramer: And furthermore, as another basis for that motion, the rule of law applicable with reference to agency and the degree of proof required to establish that agency has not been met.

* * * * * * * *

5 The Court: I believe that the motion should be overruled.

PLAINTIFF'S EXHIBIT 2.

National Bituminous Coal Wage Agreement of 1950 as Amended Effective December 1, 1958.

Protective Wage Clause.

The United Mine Workers of America (which, as used in this Clause, includes all of its Districts, Local Unions, Officers or Agents) and the Operators signatory hereto affirm their intention to maintain the integrity of this contract in all of its parts. The objective of this contract is to provide the maximum possible continuity and stability of employment under the conditions set forth herein. The parties hereto agree that bituminous coal mines shall be so operated as not to debase or lower the standards of wages, hours, safety requirements and other conditions of work, established by this contract. The parties recognizing their obligation each as to the other to exercise all possible efforts and means to attain these objectives further agree as follows:

A. During the period of this Contract, the United Mine Workers of America will not enter into, be a

party to, nor will it permit any agreement or understanding covering any wages, hours or other conditions of work applicable to employees covered by this Contract on any basis other than those specified in this Contract or any applicable District Contract. The United Mine Workers of America will diligently perform and enforce without discrimination or favor the conditions of this paragraph and all other terms and conditions of this Contract and will use and exercise its continuing best efforts to obtain full compliance therewith by each and all the parties signatory thereto.

B. It is recognized that when signatory operators mine, prepare, or procure or acquire under subcontract arrangements, bituminous coal mined under terms and conditions less favorable than those provided for in this contract, they deprive employees of employment opportunities, employment conditions and other benefits which these employees are entitled to have safeguarded, stabilized and protected. Accordingly, the Operators agree that all bituminous coal mined, produced, or prepared by them, or any of them, or procured or acquired by them or any of them under a subcontract arrangement, shall be or shall have been mined or produced under terms and conditions which are as favorable to the employees as those provided for in this Contract.

"Procured or acquired under a subcontract arrangement" means any contract, lease, license, agreement, arrangement or understanding pursuant to which the signatory operator acquires coal, either as principal or agent, directly or indirectly from a producer other than such signatory for delivery to a person other than such signatory.

Plaintiff's Exhibit 2

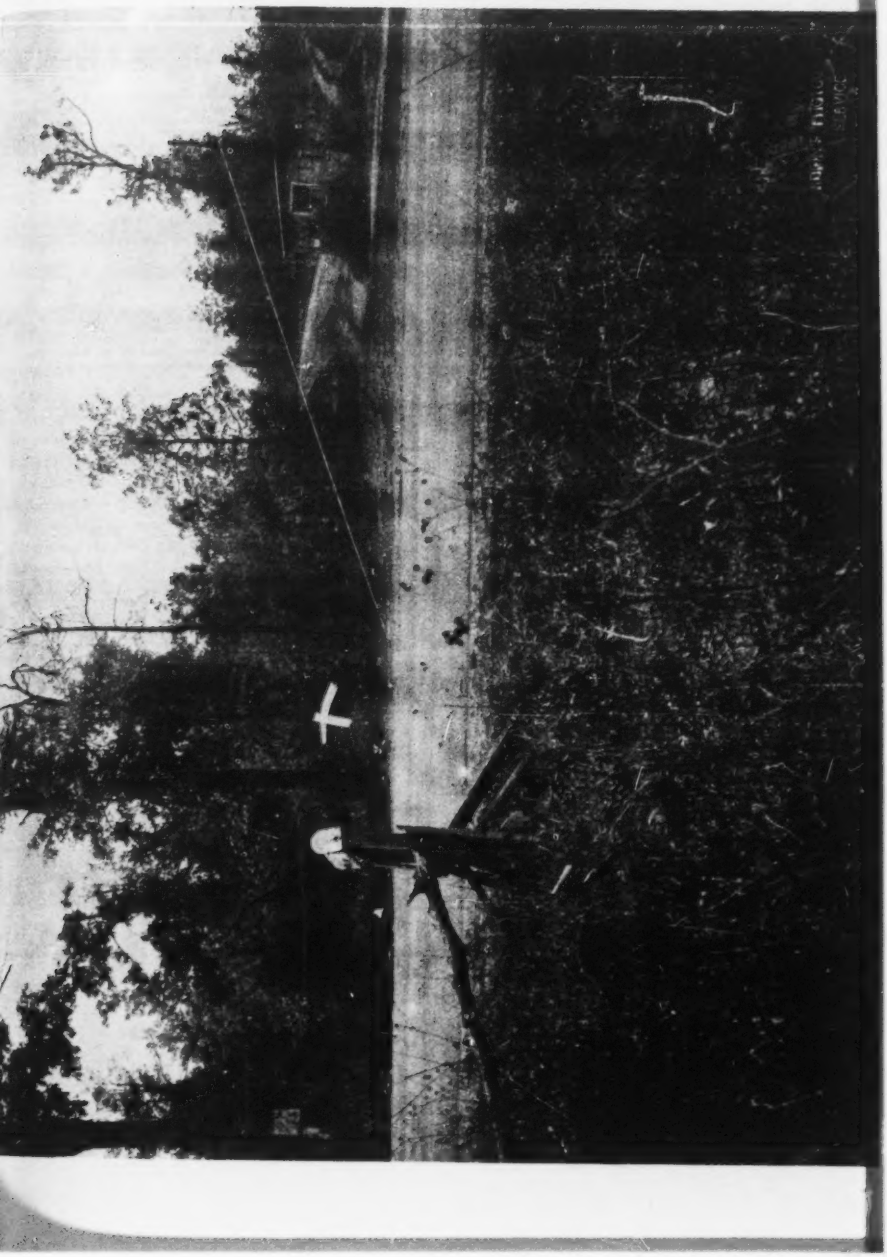
The obligation assumed hereunder shall not affect any agreement in effect as of the date of execution of this contract: Provided, however, that any operator signatory hereto who is a party to any agreement inconsistent with the obligations assumed hereunder shall not maintain such inconsistent agreement in effect beyond the first date at which such agreement may be terminated by him in accordance with its terms.

The Operators signatory to this agreement shall so conduct their own operations (whether operated directly or indirectly, or through subsidiaries or affiliates) so as to fully comply with their obligations under this Clause. The obligation of each Operator signatory hereto, which is several and not joint, to fully perform all the conditions in this paragraph B contained, shall be a direct and continuing obligation of said Operator during the life of this Agreement.

As a part of the consideration for this Agreement, the Operators signatory hereto agree that this Clause covers the operation of all the coal lands, coal producing or coal preparation facilities owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this Agreement, or acquired during its terms which may hereafter (during the term of this Agreement) be put into production or use. The said Operators agree that they will not lease, license, or contract out any coal lands, coal producing or coal preparation facilities as a subterfuge for the purpose of avoiding the application of this Clause.

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PLAINTIFF'S EXHIBIT 3.



PLAINTIFF'S EXHIBIT 15.

SCHEDULE C (Form 1040)	U. S. Treasury Department—Internal Revenue Service **PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION** (For Computation of Self-Employment Tax, see Page 3)	1956

Attach this schedule to your Income Tax Return. Form 1040 — Partnerships, Joint Ventures, Etc. Must File On Form

For Calendar Year 1956, or other taxable year beginning , 1956, and ending , 19

Name and Address as shown on page 1, Form 1040

Paul Gibbs

Item (see instructions—page 2)

A. Principal business activity: Coal Operator (Retail Store, wholesale, farming, etc.) (Principal product or service)

B. Business name: Paul Gibbs Coal Co

C. Business address: Rt 1 (Number and street or rural route) Tracy City (City or post office) Grundy (County) Tenn (State)

● **IMPORTANT**—If you had more than one business, a separate page 1 of Schedule C must be completed for each business.

Line (see instructions—page 2)		
1. Total receipts $ ..... less allowances, rebates, and returns $		$ 310,247.0
2. Inventory at beginning of year	$	
3. Merchandise purchased $ 105,043.34 less any items withdrawn from business for personal use $	105,043.34	
4. Cost of labor (do not include salary paid to yourself)	109,905.06	
5. Material and supplies	33,459.69	
6. Other costs (explain in Schedule C-2)	12,176.24	
7. Total of lines 2 through 6	$ 260,589.31	
8. Inventory at end of year		260,589.3
9. Cost of goods sold (line 7 less line 8)		$ 49,657.
10. Gross profit (line 1 less line 9)		
OTHER BUSINESS DEDUCTIONS		
11. Salaries and wages not included on line 4 (do not include any paid to yourself)	$	
12. Rent on business property		
13. Interest on business indebtedness		
14. Taxes on business and business property	7,477.72	
15. Losses of business property (attach statement)		
16. Bad debts arising from sales or services		
17. Depreciation and obsolescence (explain in Schedule C-1)	12,356.71	
18. Repairs (explain in Schedule C-2)	11,988.94	
19. Depletion of mines, oil and gas wells, timber, etc. (attach schedule)		
20. Amortization (attach statement)		
21. Other business expenses (explain in Schedule C-2)	905.54	
22. Total of lines 11 through 21		32,632.93
23. Net profit (or loss) (line 10 less line 22). Also enter on line 24, page 3 of this schedule, and on line 8, page 1, Form 1040		$ 17,024.

PLAINTIFF'S EXHIBIT 16.

SCHEDULE C (Form 1040)

U. S. Treasury Department—Internal Revenue Service

PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION

(For Computation of Self-Employment Tax, see Page 3)

1957

Attach this schedule to your Income Tax Return, Form 1040 — Partnerships, Joint Ventures, Etc. Must File On Form 1065

For Calendar Year 1957, or other taxable year beginning , 1957, and ending , 195

Name and Address as shown on page 1 of Form 1040: Paul Gibbs - Rt 1 - Tracy City, Tenn.

A. Principal business activity: Coal Operator (Retail trade, wholesale trade, lawyer, etc.) (Principal product or service)

B. Business name: M.D.

C. Business address: Rt 1. Tracy City, Tenn. (Number and street or rural route) (City or post office) (State)

IMPORTANT—If you had more than one business, a separate page 1 of Schedule C must be completed for each business.

1. Total receipts $ ..... less allowances, rebates, and returns $			$ 205,369.47
2. Inventory at beginning of year	$		
3. Merchandise purchased $ 83,906.61 ..... less any items withdrawn from business for personal use $	83,906.61		
4. Cost of labor (do not include salary paid to yourself)	60,557.50		
5. Material and supplies	20,273.00		
6. Other costs (explain in Schedule C-2)	4,605.41		
7. Total of lines 2 through 6	$ 169,342.52		
8. Inventory at end of year			169,342.52
9. Cost of goods sold (line 7 less line 8)			$ 36,026.95
10. Gross profit (line 1 less line 9)			
OTHER BUSINESS DEDUCTIONS			
11. Salaries and wages not included on line 4 (do not include any paid to yourself)	$		
12. Rent on business property			
13. Interest on business indebtedness			
14. Taxes on business and business property	600.79		
15. Losses of business property (attach statement)			
16. Bad debts arising from sales or services			
17. Depreciation (explain in Schedule C-1)	34,411.79		
18. Repairs (explain in Schedule C-2)	1,814.96		
19. Depletion of mines, oil and gas wells, timber, etc. (attach schedule)			
20. Amortization (attach statement)			
21. Other business expenses (explain in Schedule C-2)	1,476.37		
22. Total of lines 11 through 21			38,685.36
23. Net profit (or loss) (line 10 less line 22). Enter here, on line 24, page 3, and on line 8, page 1, Form 1040			$ 2,658.41

PLAINTIFF'S EXHIBIT 17.

SCHEDULE C (Form 1040)	U. S. Treasury Department—Internal Revenue Service **PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION** (Compute Social Security Self-Employment Tax on Page 3)	1958

Attach this schedule to your Income Tax Return, Form 1040 — Partnerships, Joint Ventures, Etc., Must File On Form 1065

For Calendar Year 1958, or other taxable year beginning ..... 1958, and ending ..... , 19

Name as shown on page 1 Form 1040 . Paul Gibbs Coal Co

If you had more than one business, or husband and wife had separate businesses, a separate page 1 of Schedule C must be completed for each business.

A. Principal business activity: (See instructions, page 2) Coal Operator + Hauling (Principal product or service)

B. Business name ..... Paul Gibbs Coal Co

C. Business location ..... Pidgeon Creek (City or post office) Grundy (County) Tenn (State)

D. Did you file an Employer Quarterly Tax Return, Form 941, for any quarter of 1958? ☑ Yes ☐ No. E. Employer's Identification Number, if any 62-0212498 F. Is this business within the legal boundaries of a municipality? ☐ Yes ☒ No.

G. Did you own this business on December 31, 1958? ☑ Yes ☐ No. H. How many months in 1958 did you own this business? 12

1. Total receipts $ ..... less allowances, rebates, and returns $			$ 55,761.50
2. Inventory at beginning of year	$		
3. Merchandise purchased $ (see) 99,436.94 less any items withdrawn from business for personal use $		99,436.94	
4. Cost of labor (do not include salary paid to yourself)		8,105.62	
5. Material and supplies		2,276.89	
6. Other costs (explain in Schedule C-2)		17,817.18	
7. Total of lines 2 through 6	$		
8. Inventory at end of year			24,055.83
9. Cost of goods sold (line 7 less line 8)			$ 31,705.67
10. Gross profit (line 1 less line 9)			
OTHER BUSINESS DEDUCTIONS			
11. Salaries and wages not included on line 4 (exclude any paid to yourself)	$		
12. Rent on business property			
13. Interest on business indebtedness		6,596.06	
14. Taxes on business and business property			
15. Losses of business property (attach statement)			
16. Bad debts arising from sales or services		22,393.14	
17. Depreciation (explain in Schedule C-1)		10,903.03	
18. Repairs (explain in Schedule C-2)			
19. Depletion of mines, oil and gas wells, timber, etc. (attach schedule)			
20. Amortization (attach statement)			
21. Other business expenses (explain in Schedule C-2)		5,349.32	
22. Total of lines 11 through 21			55,181.55
23. Net profit (or loss) (line 10 less line 22). Enter here, on line 24, page 3; and on line 8, page 1, Form 1040.			$ 23,476.87

PLAINTIFF'S EXHIBIT 18.

SCHEDULE C (Form 1040)

U. S. Treasury Department—Internal Revenue Service

PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION

(Complete Social Security Self-Employment Tax on Page 3)

1959

File this schedule in your Income Tax Return, Form 1040 — Partnerships, Joint Ventures, Etc., Must File On Form 1065

Calendar Year 1959, or other taxable year beginning 1959, and ending , 19

Name as shown on page 1, Form 1040 Paul Gibbs - Hazy, Ky

If you had more than one business, or husband and wife had separate businesses, a separate page 1 of Schedule C must be completed for each business.

Principal business activity: Coal Mining, Hauling (Retail trade, wholesale trade, lawyer, etc.) (Principal product or service)

Business name: Paul Gibbs Coal Co Employer's Identification Number: 62-0717198

Business location: Rt 1 Hazy Ky Tenn (Number and street or rural route) (City or post office) (State)

Total receipts $ ..., less allowances, rebates, and returns $		$ 308,884	55
Inventory at beginning of year	$		
Merchandise purchased $ ..., less any items withdrawn for business for personal use $			
Cost of labor (do not include salary paid to yourself)	75,589.76		
Material and supplies	30,167.43		
Other costs (explain in Schedule C-2)	11,307.03		
Total of lines 2 through 6	$ 116,875.02		
Inventory at end of year			
Cost of goods sold (line 7 less line 8)		116,875	02
Gross profit (line 1 less line 9)		$ 192,009	53
OTHER BUSINESS DEDUCTIONS			
Salaries and wages not included on line 4 (exclude any paid to yourself)	$		
Rent on business property			
Interest on business indebtedness	300.00		
Taxes on business and business property	6,760.76		
Losses of business property (attach statement)			
Bad debts arising from sales or services			
Depreciation (explain in Schedule C-1)	49,386.61		
Depletion (explain in Schedule C-2)	17,478.76		
Depletion of mines, oil and gas wells, timber, etc. (attach schedule)			
Amortization (attach statement)			
Other business expenses (explain in Schedule C-2)	117,255.71		
Total of lines 11 through 21		191,431	89
Net profit (or loss) (line 10 less line 22). Enter here; on line 24, page 3; and on line 8, page 1, Form 1040		$ 577	64

PLAINTIFF'S EXHIBIT 19.

SCHEDULE C (Form 1040) U. S. Treasury Department Internal Revenue Service	PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION (Compute Social Security Self-Employment Tax on Page 3)	1960

A. Business name and location ..... Paul Yates

B. Principal Business Activity (See Instructions, page 2) ..... (Retail trade, lawyer, etc.) (Principal product or service)

C. Employer's Identification Number .....

1. Total receipts $ ..... less allowances, rebates, and returns $			$ 208,390
2. Inventory at beginning of year	$		
3. Merchandise purchased $ 139,762.62 ..... less any items withdrawn from business for personal use $	139,762.62		
4. Cost of labor (do not include salary paid to yourself)	24,846.15		
5. Material and supplies	19,841.15		
6. Other costs (explain in Schedule C-2)	3,745.40		
7. Total of lines 2 through 6	$ 207,196.59		
8. Inventory at end of year			
9. Cost of goods sold (line 7 less line 8)			207,196
10. Gross profit (line 1 less line 9)			$ 1,194
OTHER BUSINESS DEDUCTIONS			
11. Salaries and wages not included on line 4 (exclude any paid to yourself)	$		
12. Rent on business property			
13. Interest on business indebtedness	90.00		
14. Taxes on business and business property	6,176.71		
15. Losses of business property (attach statement)			
16. Bad debts arising from sales or services			
17. Depreciation (explain in Schedule C-1)	22,691.49		
18. Repairs (explain in Schedule C-2)	11,317.62		
19. Depletion of mines, oil and gas wells, timber, etc. (attach schedule)			
20. Amortization (attach statement)			
21. Other business expenses (explain in Schedule C-2)			
22. Total of lines 11 through 21			46,471
23. Net profit (or loss) (line 10 less line 22). Enter here; on line 24, page 3; and on line 8, page 1, Form 1040			$ 45,277

PLAINTIFF'S EXHIBIT 20.

SCHEDULE C (Form 1040) — Treasury Department — Internal Revenue Service

PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION

(Complete social security self-employment tax on Schedule C-3 (Form 1040))

1961

File this Schedule to your Income Tax Return, Form 1040 — Partnerships, Joint Ventures, Etc., Must File On Form 1065

Name and address as shown on page 1, Form 1040: Paul Gutts Tracy City, Tenn

Principal business activity (retail trade, wholesale trade, lawyer, etc.): Coal Operator or Ranching — (Principal product or service)

Business name: Paul Gutts Coal Co — B. Employer Identification Number

Business location (Number and street or rural route): Tracy City (City, town or post office) Tenn (State)

1 Gross receipts $ ..... less allowances, rebates, and returns $		148,853 94
2 Inventory at beginning of year (If different than last year's closing inventory attach explanation)	Corrected Value	2,009 00
		146,853 94
3 Purchases purchased $ 96,839.74 (Cost) less any items withdrawn for business for personal use $	96,839.74	
4 Cost of labor (do not include salary paid to yourself)	9,925.87	
5 Materials and supplies	15,871.33	
6 Other costs (explain in Schedule C-2)	4,139.73	
7 Total of lines 2 through 6	126,775.60	
8 Inventory at end of this year		
9 Cost of goods sold (line 7 less line 8)		126,775 60
10 Gross profit (subtract line 9 from line 1)		20,078 34

OTHER BUSINESS DEDUCTIONS

11 Salaries and wages not included on line 4 (exclude any paid to yourself)	
12 Rent on business property	
13 Interest on business indebtedness	
14 Taxes on business and business property	3,057.38
15 Losses of business property (attach statement)	
16 Bad debts arising from sales or services	
17 Depreciation (explain in Schedule C-1)	53,777.68
18 Depletion (explain in Schedule C-2)	11,510.99
19 Depletion of mines, oil and gas wells, timber, etc. (attach schedule)	
20 Amortization (attach statement)	
21 Insurance	
22 Legal and professional fees	
23 Miscellaneous	
24 Other business expenses (explain in Schedule C-2)	
25 Total of lines 11 through 24	37,791 53
26 Net profit (or loss) (subtract line 25 from line 10). Enter here, on line 1, Schedule C-3; and on line 6, page 1, Form 1040	17,663 19

C

Plaintiff's Exhibit 30

PLAINTIFF'S EXHIBIT 30.

Stanlee Hampton	Paul Callis	Everett Roberts	Houston Beaumont
President	Vice-President	Vice-President	Secretary

Tennessee Consolidated Coal Company

(Monogram)

607 Commerce Union Building
Nashville 3, Tennessee

January 12th, 1960.

United Mine Workers of America
Washington, D. C.

Re: National Coal Wage Agreement of 1950 as amended effective December 1, 1958.

Gentlemen:

Pursuant to action taken by the Board of Directors of our company and in accordance with the paragraph providing for termination of the December 1, 1958 amendment to the collective bargaining contract by and between the United Mine Workers of America and the Tennessee Consolidated Coal Company, you are hereby notified that the said Tennessee Consolidated Coal Company elects to terminate said contract effective March 15, 1960.

Yours very truly,

TENNESSEE CONSOLIDATED COAL CO.,
By STANLEE HAMPTON,
President.

CC:

United Mine Workers of America
District No. 19
Middlesboro, Kentucky

Palmer Local
Palmer, Tennessee

Plaintiff's Exhibit 31

PLAINTIFF'S EXHIBIT 31.

January 14, 1960

Mr. James Ridings, President
District 19, UMWA
Box 116
Middlesboro, Kentucky

Re: Tennessee Consolidated Coal Co.
Tracy City, Tennessee.

Dear Sir and Brother:

Enclosed herewith is a copy of a self-explanatory communication dated January 12, 1960, from Stanlee Hampton, President, Tennessee Consolidated Coal Company, which is signatory to the National Bituminous Coal Wage Agreement of 1950 as Amended, effective December 1, 1958, by membership in the Southern Tennessee Coal Producers' Association.

Would you please advise this office with respect to the contractual status of the Tennessee Consolidated Coal Company subsequent to March 15, 1960.

Sincerely yours,

W. A. BOYLE,
Assistant to the President.

B/d/t

Enclosure

PLAINTIFF'S EXHIBIT 34.

Paul Gibbs.

Contract to Haul Coal From Grundy Mining Company for Redstone Arsenal.

Estimated Income—		
35,000 Tons at $.78 a Ton (at rate of 10,000 tons a week, would require 3½ weeks to deliver)		$27,300.00
Estimated Expense—		
Labor (3½ weeks × $1,609.60 a week)	$5,633.60	
Gasoline (3½ weeks × $1,120.00 a week)	3,920.00	
Oil and Grease (3½ weeks × $48.00 a week)	168.00	
Tires and Tubes (3½ weeks × $153.84 a week)	538.44	
Truck Repairs (3½ weeks × $222.87)	780.05	
Workmen's Compensation Insurance ($2.00 per $100.00 × $5,633.60 Labor)	112.67	
Truck Insurance (3½ weeks × $37.65 a week)	131.78	
Payroll Taxes (6⅛% × $5,633.60)	345.06	
Truck Tags (3½ weeks × $41.04 a week)	143.64	
Telephone (3½ weeks × $5.77 a week)	20.20	
Depreciation (3½ weeks × $422.08 a week)	1,477.28	
Estimated Expense		13,270.72
Estimated Net Profit on Contract		$14,029.28

Plaintiff's Exhibit 38

DEFENDANT'S EXHIBIT 38.

Whitwell, Tennessee,
September 7, 1961.

Mr. Paul Gibbs,
Tracy City, Tennessee.

Dear Mr. Gibbs:

It has just come to my attention that a mine (number 2-074) that was formerly leased by you is presently being worked in your name. In checking through our files I note that a lease cancellation letter for this mine was sent to you on January 5th of this year. This is to advise you that since no lease is in existence covering this mine all work in and around 2-074 should be stopped immediately.

Please contact me at our Reel's Cove office if there are any questions concerning this matter.

Yours truly,

TENNESSEE PRODUCTS & CHEMICAL CORPORATION,

HOWARD C. HUMAN,
Assistant to Vice President—Mining.

HCH/wmc

Plaintiff's Exhibit 39

DEFENDANT'S EXHIBIT 39.

Whitwell, Tennessee,
September 7, 1961.

Mr. Paul Gibbs,
Tracy City, Tennessee.

Dear Mr. Gibbs:

As you know we have been having considerable problems with the quality of our outside coal that is being put in on the Marquette Cement Plant contract. After going over our latest analysis covering this coal it appears that the hoped for improvements have not been forth coming and that quality problems will continue to problem with this coal.

In order to try to improve this situation we are going to eliminate the delivering of purchased coal from mines or companies that are operating outside of the Tepco lease holdings. Effective Monday, September 18th, all coal delivered on the Marquette contract must come from mines that are operating on the Tepco lease hold.

This should give you ample time to make the necessary arrangements to purchase coal from the small mines on our property in an amount equal to that which you presently purchase from various outside sources.

Please contact me at our Reel's Cove office if you have any questions on this matter.

Yours truly,

TENNESSEE PRODUCTS & CHEMICAL CORPORATION,

HOWARD C. HUMAN,
Assistant to Vice President—Mining.

HCH/wmc

Plaintiff's Exhibit 40

DEFENDANT'S EXHIBIT 40.

Whitwell, Tennessee,
September 26, 1961.

Mr. Paul Gibbs,
Tracy City, Tennessee.

Dear Mr. Gibbs:

During the past several weeks there has been considerable discussion concerning the ash analysis of the outside coal being delivered on the Tepco coal contract at the Cowan Cement Plant.

On September 7, 1961, you were notified verbally and by letter from this office that effective September 18th all deliveries made on this contract must be of coal mined from the Tepco lease holdings. According to our recorded scale weight tickets this was not carried out during the week ending September 22, 1961. As a result this is official notification that no further deliveries of coal from any source will be accepted on the Cowan Cement Contract. This will confirm our phone conversation of last evening.

Should you have any further question on this matter, please contact me at the Whitwell office.

Yours truly,

HOWARD C. HUMAN,
Assistant to Vice President, Tennessee
Products & Chemical Corporation.

HCH/wmc

cc: Mr. R. E. Merryman
Mr. H. I. Allen
Mr. W. A. Moody

Testimony of Paul Gibbs

In the
UNITED STATES DISTRICT COURT
For the Eastern District of Tennessee,
Southern Division.

PAUL GIBBS

vs.

UNITED MINE WORKERS OF AMERICA.

No. Civil 3771.

Transcript of proceedings and evidence introduced in the trial of the case, beginning 7th day of November, 1962, before the Honorable Frank W. Wilson, U. S. District Judge, and a jury.

Appearances:

Joe Van Derveer, Esq., and Wm. Ables, Esq., attorneys for the plaintiff.

R. R. Kramer, Esq., E. H. Rayson, Esq., and Willard P. Owens, Esq., attorneys for defendant.

* * * * * * *

Mr. Rayson: Ladies and gentlemen, I will say this: that we represent the International Union of the United Mine Workers, a defendant in this case.

* * * * * * *

2 **MR. PAUL GIBBS,**

having first been duly sworn, testifies as follows:

Direct Examination,

By Mr. Van Derveer:

Q. Will you state your name please?

A. Paul Gibbs.

Q. Where do you live, Mr. Gibbs?

A. Tracy City, Tenn.

* * * * * * *

Q. Now, how long have you been engaged in the coal, or coal mining or coal hauling business?

A. 32 years.

Q. Practically you're entire——

3 A. Since I was 15 years old.

* * * * * * *

4 Q. Now, let's get back prior to the events that happened in that particular area. For a number of years, have you been operating mines over in that area?

A. Well, since July of 1953 the last time.

Q. Who owned the land upon which these mines were located?

A. Tennessee Products and Chemical Corporation.

Q. What arrangement existed between you and Tennessee Products whereby you were mining these lands?

A. I had leased the Tennessee Products' mine and coal and delivered it to them, and they sold it themselves.

Q. Generally, where were those mines located?

A. Well, I, at one time, had about 5 mines in that area.

Q. What——

A. I had three, what we called "employed haulers" in the pocket.

Q. When you say "the pocket" that's the area that you——

A. That's about a mile further on down this blacktop road from where I pointed out "Dogwood Flat".

Q. Now, to lay the background on this general area, where over in that area are these good coal mining lands?

A. Well, the best thing that's left in that area now that hasn't been worked out is in the Gray's Creek area.

Q. Uh-huh, and you had some mines with Tennessee
5 Products in and around that area. Is that correct?

A. Yes, sir. On adjoining property with the highway going into the pocket, there's a yellow painted line there, Tennessee Consolidated owns on the right, Tennessee Products on the left, and during the present time, I was operating on Products on the left hand side of the road.

* * * * * * * *

Mr. Van Derveer: O. K. I think, ladies and gentlemen of the jury, we might point that out a little more carefully at this time, because I know it was confusing to the court in discussing the proceedings and it may be to the jury. As you will see from time to time in the trial of this case, there will be a reference to Tennessee Consolidated and there will be a reference to Tennessee Products. Now, these are two separate and distinct companies or corporations, so keep that in mind when they talk about Tennessee Consolidated or when they talk about Tennessee Products.

Q. Now, Mr. Gibbs, first on Tennessee Products, did Tennessee Products operate some mines of their own, or did they get their entire production by leasing out
6 the land to fellows like yourself?

A. They had one mine that they operate themselves and the rest was lessee mines.

Q. All right, now, let's talk about Consolidated. Did Consolidated operate their own mines, or did they operate through lessees?

A. Same way, just like Tennessee Products.

Q. Now, but those two companies are competitors, are they?

A. That's right.

Q. And they are distinct companies, are they?

A. That's right.

Q. Separate companies. Well, let's lead up toward the 15th and 16th of August of 1960. Now, sometime prior to that or immediately before that, did you have any rolling stock or equipment?

A. Yeah.

Q. Just tell the court and jury, just, let's say there on the 10th, 12th, and 13th of August, 1960, what trucks and equipment did you have?

A. I had eight dump trucks at that time.

Q. Now, when you say dump trucks, explain to the jury. Some of them probably understand, but I am sure that I don't?

A. They're regular coal trucks with coal bodies and hoists on them. We call them dump trucks.

7 Q. Now, what size trucks were they?

A. Well, ordinarily they're listed as two and one-half tons, but we haul about 20 or 22 tons on them.

Q. How many wheels do they have on them?

A. Ten.

Q. At that time, and we are still referring to that period of time immediately before the 15th of August, 1960, how many employees did you have in your mines and in your trucks?

A. Well, during that time, around the 15th and 16th of August, 1960, I had eight truck drivers.

* * * * * * *

A. And I couldn't say positive how many men I had employed in the mines at that time, but I'd say somewhere in the neighborhood of 15 or 20.

Q. Now, at that time, how many mines were you running or operating?

A. Two.

Q. Uh-huh. And those two were on the lands leased from The Tennessee Products Chemical Company, is that correct?

A. Yes, sir.

Q. Now, where were you hauling the coal that was being used, or hauled in these eight trucks?

A. Well, I was only using about 2 of the trucks in
8 my own operation, and I was hauling coal to Bennett Lake or down into Woodville Ramp, wherever The Tennessee Products and Chemical Corporation advised me to take the coal.

* * * * * * *

Q. And the remainder of your trucks, the other six, were being used for what now?

A. Hauling coal from Pikeville Coal Company on a strip-logger job under Tennessee Products lease.

* * * * * * *

Q. Uh-huh, then if I understand you correctly, two of your trucks were in your own mines and you were hauling on the other six, is that correct?

A. Yes, sir.

Q. Now, on or about the 10th, 11th, or 12th, or somewhere in that area, state whether or not you were contacted by anyone with Tennessee Consolidated Coal Company or The Grundy Mining Company, in regard to doing anything for them?

A. On Friday afternoon, August 12th, 1960, Mr.
9 Judson Harwood was up from Nashville.

Q. Just a moment now. Who is Mr. Judson Harwood?

A. He is an attorney over there, and he was president of the Grundy Mining Company at that time.

* * * * * * *

The Court: Yes, it's agreed and stipulated, ladies and gentlemen, between the parties, that Grundy Mining Com-

pany was a wholly owned subsidiary of Tennessee Consolidated Coal Company.

Q. Now prior to the time that Mr. Judson Harwood, the Nashville Attorney, contacted you, had you ever heard of The Grundy Mining Company?

A. No, sir. I had not.

Q. So far as you know, it was a new company, a new concern?

A. Yes, sir.

Q. At that time, did you know Mr. Judson Harwood?

A. No, sir, I never even heard of him.

Q. How were you contacted by him?

A. He called me on the phone at home.

Q. Now, what was the purpose of his calling you?

10 A. He told me that he wanted to start up some mines in Gray's Creek, and I had recommended as a mine superintendent, and asked me if I would be interested in the job.

Q. And you told him what?

A. I asked him what would be the results out of it—what—would I be assured of a job, and during the conversation he said "Well, what about starting off at $600.00 a month?" I said "that won't interest me." I said "I have some trucks and I couldn't just walk off and leave those trucks and these other two little mines that I have going", I said "they'll soon be worked out, but I couldn't accept $600.00 and just leave my trucks over there for nobody to look after", and then I asked him what about considering taking the job as the mine Superintendent if he would give me the hauling from these mountains. He said, "I'll do it." I said, well, what will you pay on the haulage? He said, "seventy-eight cents a ton is the regular price."—and I accepted.

Q. Now, what arrangement, if any, was made regarding the maintenance and upkeep of your trucks?

A. Well, that was left up to me entirely.

Q. In other words, the seventy-eight cents was gross. You were the——

A. That's right. That was the gross receipts that I was drawing from Grundy Mining Company for one haul.

Q. Did you accept the terms of that contract of employment?

A. Yes, sir.

11 Q. And you were instructed by Mr. Harwood to begin work at what time?

A. Seven o'clock on Monday morning on August the 15th.

Q. Now, let's stop right there just a moment, Mr. Gibbs, and go back a bit. In the past, had you had difficulty with The United Mine Workers of America in that area?

A. Nothing more than just a little strike, occasionally. Something probably come up between the men, and they'd go out for maybe one day, and sometimes they'd be gone a month.

Q. But you continued in business?

A. Yes, sir.

Q. At that time, who was the Field Representative, I believe he is described, in your Whitwell, Tracy City, Palmer area, for The United Mine Workers of America?

A. Mr. George Gilbert.

Q. Did you know Mr. George Gilbert?

A. Yes, sir.

Q. What were his duties?

A. Well, he was to settle strike disputes, get you to sign the contract, and settle all grievances that might rise between the employes and the operators.

Q. Prior to Mr. Gilbert coming into the area, who had preceded him?

A. I think, Mr. Matt Bunch.

Q. Mr. Bunch?

12 A. Mr. Matt Bunch.

Q. Now, for ~~purposes~~ so that the jury will understand, is Mr. Gilbert still over there today?

A. No, sir, he isn't.

Q. And who is in that area now?

A. Howard Madewell.

* * * * * * *

Q. Now each of these gentlemen, Mr. Bunch, Mr. Gilbert, and Mr. Madewell were described as what? What were they?

A. District Nineteen Representatives is the way I've always understood.

Q. Now what do you mean when you say District Nineteen Representatives?

A. Well, the way I understand it is that they sit out a set for certain years for these men to control, and as far as I know, at that time, Mr. Gilbert had the Palmer, Whitwell, and Tracy City area under his control.

Q. But worked out of District Nineteen?

A. Yes, sir.

Q. And where is District Nineteen?

A. Middlesboro, Kentucky.

Q. Middlesboro, Kentucky. At the time that you accepted this contract of employment from Mr. Judson Harwood, state whether or not the Tennessee Consoli-

13 dated Coal Company was operating under a contract with The United Mine Workers of America?

A. They was out on strike at that time.

Q. State whether or not, at that time, The Tennessee Products and Chemical Company was operating under a contract with The United Mine Workers of America?

A. Yes, sir.

Q. Now, Mr. Gibbs, you have seen this contract that is referred to as The National Bituminous Wage Agreement of 1958, as Amended, have you not?

A. Yes, sir.

Q. What contract is that?

A. What kind of contract——

Mr. Van Derveer: Now, by agreement of the parties, may it please the court, Mr. Rayson and Mr. Turnblazer, has furnished us with a copy of the contract, which we would like to introduce into evidence, and at this time, have it marked and then show it to Mr. Gibbs.

(Plaintiff's Collective Exhibit No. 2 received in evidence.)

Q. Now, Mr. Gibbs, before you there, identified, is the Plaintiff's Exhibit No. 2, is what purports to be a contract with The United Mine Workers of America. Now my question, sir, is that the same contract that all the mines had?

A. Yes, sir—with all these amendments from 1950
14 on up through the last one, I believe, was signed in 1958.

Q. That is correct, sir. Then if any of the mines had the contract with The United Mine Workers of America it is that particular contract, is it?

A. That's right.

Q. Is there any variance for it? What I mean is do they have one contract for one mine, a different one with another mine, a different with another mine?

A. No, sir. This is all the same contract, if everybody works under the same contract.

Q. Sir?

A. That's the same contract that everybody signed but nobody paid—to get the same thing at each mine.

Q. Yes, sir. Well, I mean that's the same contract that every mine had?

A. That's right.

Q. And you told us that at the time, immediately before August 15 and 16, 1960, that The Tennessee Con-

solidated Coal Company did not have a contract. Is that correct?

A. They wasn't working. No, sir.

Q. They were not working?

A. No, sir.

Q. Do you know how long The Tennessee Consolidated Coal Company had been down, or how long the strike had been going on, or how long it had been since they were working?

A. Prior to August of 1960?

Q. Prior to August 15, 1960?

A. To the best of my knowledge, since March of 1960.

Q. Since March. All right, sir. Now, getting back to the morning of the 15th, which was on a Monday morning, in conformity with Mr. Harwood's agreement or contract, did you go to the area where you were to begin work?

A. Yes, sir, I did, on August the 15th on Monday morning.

Q. Had the area been dozed off over there, or——

A. Yes, sir.

Q. Just tell the jury how a new mine is opened, and how you knew where to go?

A. Well, this road was graded in to this area where the mine was supposed to be opened up, and I was advised where to go, which I knew the directions, being familiar with this country over there. I drove down in there that morning, and on my left, going in, there was a place where they had taken a dozer and just cut the whole side of the mountain off there for about—oh—approximately between two and three hundred feet, back to the coal, and that's the way, ordinarily, you start to open up a mine.

Q. Now, how many different areas there, had been cleared out, or cleared off, or dozed off, so that you knew where to go?

A. Well, all around this mountain there you could see from place to place where they'd been in there with
16 a dozer, and my understanding was that I was to start——

Q. Now, was what has been referred to as the "Pocket Road", was that a blacktop road?

A. Yes, sir.

Q. And what type road was this Gray's Creek Road?

A. Well, just more or less a dirt road at that time. It has just been newly graded in there with the equipment.

Q. And which road was it now that was leading off down to the new mine?

A. That was what we called the "Gray's Creek Road".

* * * * * * * *

Q. Now the "Pocket Road" is the blacktop road?
17 A. That's right.

Q. And the Gray's Creek Road is the dirt road that turns off of it down into the mine areas, is that correct? Now how far was it from the Pocket Road, that is, where you turned off the blacktop, down where the mines were actually to be opened?

A. I hadn't ever checked the mileage, and couldn't say exact, but as far as my knowledge, I'd say it was just about one mile.

Q. Now, is this Gray's Creek Road the only way in and out?

A. Yes, sir.

* * * * * * * *

19 Q. Now, Mr. Gibbs, these last two photographs, that is Plaintiff's Exhibits No. 9 and No. 10, is the road that turns off State Road 108 over on to the Pocket Road?

A. That's right.

Q. Then you go how many miles on the Pocket Road before you turn off on Gray's Creek Road?

A. Oh, approximately a mile and a half.

Q. Then you said it's a mile or so on down to the mine site?

A. Yes, sir, it's a mile on down to the mine.

Q. Yes, sir. Now, Mr. Gibbs, what time, the morning of the 15th, 15th of August, 1960, did you arrive
20 in the area there, described as Dogwood Flats, or where Gray's Creek Road turns off from the Pocket Road?

A. I don't know what time I arrived there, but I arrived down at the mine site on August the 15th approximately a quarter after six.

Q. Now, when you say the mine site, where now?

A. That's where we were going to begin work.

Q. All right, sir——

A. Down in Gray's Creek.

Q. And very briefly, tell us in your own words what you did when you got down there, and what happened, if anything?

A. Well, when I got down there, there wasn't anybody there.

Q. All right, sir?

A. I was by myself driving my pick-up. I drove down there and stopped, and I didn't get out on the ground and was just kinda' looking the area over.

Q. Now, what arrangement had been made, if any, for some miners to meet you there, in order to begin work on these new mines?

A. Mr. Judson Harwood, when he hired me, he said he'd have me 40 employees there on Monday morning.

Q. Now, when you arrived there at approximately six or six-fifteen on that morning, were the men there?

A. No, sir. There wasn't anybody there.

Q. All right, now, when you arrived there on the
21 scene, in your truck, and found no one there, what did you do?

A. I just stood there waiting for the men to show up.

Q. Did they show up?

A. No, sir.

Q. What did you do then?

A. There was a pick-up truck came down off the hill, down by the side of my truck, and pulled up and stopped, and there was three fellows got out of it.

Q. Now, where did this truck come from?

A. He came in the same direction as I came in.

Q. On Gray's Creek Road?

A. That's the only way in there, yes, sir.

Q. All right, sir. Who was in the truck and what was said to you?

A. I don't know what the feller's name is but they called him "Goose Tate."

The Court: What was the name, please?

Mr. Van Derveer: Tate, T-A-T-E.

A. Terry Hart and Eli Hue Meeks.

Q. Now, let's see if we can identify these people. Who is this Eli Hue Meeks?

A. He is an employee, or was at that time, of Tennessee Consolidated Coal Company.

Q. Do you know who these other two fellows are?

A. They were, too.

22 Q. All right, sir. And what transpired there, between you and these three men?

A. They drove down, got out of the pick-up, and went to looking around there a few minutes, and one of them said to me, he said we——

* * * * * * * *

But as a result of that conversation, what did you do?

A. I just got in my pick-up and left.

Q. And where did you go?

A. When I started out of there, I met two of the Grundy Mining Company employees——

Q. All right, sir.

A. And Johnny Cain.

Q. And Johnny Cain?

A. Yes, sir, I found out it was Johnny Cain after I met him up there. I didn't know him before.

Q. Who was Johnny Cain?

A. He was the representative of the Southern Labor Union.

Q. Of the Southern Labor Union. All right, did you
23 just pass them, there on Gray's Creek Road?

A. No, sir, we stopped.

Q. All right. Well, without going into what was said, did you then go on up to the junction of the Pocket Road?

A. Yes, sir.

Q. In your own words, briefly, but completely, tell the jury what happened when you arrived there.

A. Well, when I got back up on the Pocket Road, I'd already found out where these other boys was at, that were trying to find their way in there, and I drove around to where they were, while the other employees——

Q. Did you discuss the situation with them, then?

A. Yes, sir.

Q. Where did you go then?

A. To the best of my knowledge, after I left these boys, I went over on Daws Mountain where my trucks were hauling coal.

Q. And attended to your own business the remainder of the day?

A. Yes, sir.

Q. Now, was any work at all performed there, at the new mines——

A. No.

Q. On the 15th of August?

A. No, sir.

Q. Did you then return to the same scene the following morning, the 16th?

24 A. Yes, sir.

Q. In your own words, tell us what happened then?

A. Well, that afternoon, on Monday, August 15th, one of my truck drivers notified me at my home that he was broken down over in the Pocket. I was hauling some coal from my mine over to the coal screens, at that time, and he wanted to know if I could take him out the next morning, early, and take a axle along to go in the truck, and I told him I could. Well, about five or five-fifteen the next morning, I left with the truck driver, going to the pocket area, where my truck was broken down, and on the way in, I had to pass right by this Dogwood Flat.

Q. The junction of the Pocket and the Gray's Creek Road?

A. Yes, sir.

Q. All right?

A. I noticed a pick-up truck following me in there and I identified it later as Bobby Banks.

Q. And who was Bobby Banks?

A. He was a committeeman of the mine of the Local 5881.

Q. 5881, being the Palmer Local, wasn't it?

A. Yes, sir.

Q. All right, sir, now he was the mine committeeman. Now first, what is a mine committeeman?

A. Well, there's three of them, and any grievance comes up in the mines, this committee is supposed to settle them.

25 Q. And Bobby Banks was one of these committeemen?

A. Yes, sir.

Q. All right. Now, what transpired right there, then?

A. Well, I seen this truck following me, but I went on

in the Pocket area and took this truck driver in there where the truck had broken down.

Q. All right, sir. Now, you didn't go down the Gray's Creek Road?

A. No, sir, I did not.

Q. Then you went on down to the Pocket area, which is a different area?

A. I went in time to take him over there, so I could get back to Gray's Creek area before work time.

Q. All right?

A. But, when I got back up there, I met a mob of about a hundred or a hundred and twenty-five men.

Q. Now, when you got back where?

A. The Gray's Creek Road in Dogwood Flats.

Q. The only entrance into the new mine?

A. That's right.

Q. Then, when you arrived there, it was approximately what time?

A. I'd say around six-thirty.

Q. And the mob was how many?

A. Approximately, a hundred or a hundred and twenty-five armed men.

26 Q. All right, now, you say armed men. Mr. Gibbs, did you actually see arms, and if so, what did you see?

A. Well, I'd say 50 per cent of the men had shot-guns and rifles.

Q. Now, what did you do when you arrived there? I want you to tell——

A. About eight of them ran out in the road in front of me with guns up to their shoulders, and stopped me.

Q. All right, now, just tell the jury, in your own words, exactly what happened. Don't leave out anything, but——

A. Well, when they stopped me, Estell Woodley had a double barrel shotgun and——

Q. Just a moment now. Who is Estell Woodley?

A. He was an employee of The Tennessee Consolidated Coal Company, at that time.

Q. All right, sir?

A. He put the shotgun in his right hand after I stopped and took his left hand and opened my pick-up truck door, and got me by the arm, and tried to pull me out, and these other fellers was standing there with their guns up to their shoulder on me while he was trying to pull me out of the truck, and I knew the guy.

* * * * * * * *

27 Q. Did you get out of your truck, or were you pulled out of your truck?

A. I got out.

Q. What transpired when you got out of your truck?

A. Well, this whole mob of men, they just gathered around me there, and began telling me what they were going to do to me.

* * * * * * * *

28 Q. You did get out of your truck?

A. Yes, sir.

Q. All right. How long did you remain there at that scene?

A. Approximately 2 hours.

Q. What were you doing this period of time that you were there those two hours?

A. Well, I was trying to watch to see who was going to hit or shoot me first.

Q. All right, sir. Did you recognize—or let me rephrase it and put—Tell us what people you recognized that were in these locals there in this group?

A. Well, first was the President of the Palmer Local of the 5881, Walter Trum.

Q. The Palmer Local, we're back on 5881?

A. Yes, sir.

Q. And the President of that Local was who?

A. Walden Schrum.

Q. Now, without regard to what he said to you, did
29 you actually see him there?

A. Yes, sir.

Q. All right. Who else did you see there?

A. Well, this Bobby Banks, he was a committeeman.

Q. On 5881?

A. Yes, sir.

Q. All right. Without going into what was said there, who else did you see there?

A. Alder Brewer.

* * * * * * * *

Q. Now, who is Mr. Alder Brewer?

A. Well, I couldn't say positive, but I think he was Secretary and Treasurer of the Local at that time.

Q. Of 5881, also?

A. Yes, sir.

Q. Again, the Palmer Local, wasn't it?

A. Yes, sir.

Q. Now, what others did you recognize there?

A. T. E. Partain.

* * * * * * * *

Q. What position did he hold with the Union?

30 A. Well, I don't know. He was just an employee.

Q. All right. What others did you recognize in this group?

A. Marshal Sweeten.

Q. Do you know what position he held?

A. No, sir, I don't. Douglas Thomas . . .

* * * * * * * *

Q. What position, if any, did he hold with the Union?

A. Not any, that I know of.

Q. All right, sir. What others did you recognize?

A. Of this particular Local?

Q. Union men that you recognized there in this mob?

A. Frank Scruggs. There was two or three Tates there, but knowing their given name, I don't know. I just know they were Tates.

Q. Go ahead.

A. Lionel Sweeten, Eli Hue Meeks, Bo McGwirt. . . .

* * * * * * *

A. Call him "Bo". That's not his name but everybody was calling him "Bo" there that morning. There
31 was numerous others, I couldn't begin to say who they all were.

Q. Did you leave that immediate area after the two hour period?

A. Yes, sir. I left that area, but part of this mob was in front and part of them behind me to keep me from getting away from them.

Q. In other words, they sort of took you out of the area, is that it?

A. Yes, sir.

Q. Now, while you were there, did you actually see or hear any shots fired?

A. No, sir, I did not.

Q. Now, when you left, how many cars were ahead of you?

A. Several. I couldn't say how many.

Q. How many were behind you?

A. It looked like they's just about to split the thing up. Part of them drove out in front of me to get in the middle of them.

* * * * * * *

32 Q. Where were you taken when you left?

A. The road that goes into Coal Valley Mine.

Q. Now, where is the Coal Valley Road, in relation to the Pocket and Gray's Creek Road?

A. I'd say approximately it was one mile northwest on 108 Highway, of the Pocket Road.

Q. Toward——

A. Palmer.

* * * * * * *

33 Q. Now, how far is the Coal Valley Mine from Highway 108, where you turned off?

A. I've been in there plenty of times. I used to operate a truck mine in there, and to the best of my knowledge it's about two miles.

Q. Whose mine is the Coal Valley Mine?

A. Tennessee Consolidated Coal Company.

Q. And was Tennessee Consolidated operating it at the time?

A. No, sir. They was out on strike.

Q. All right. They were out on strike then. What happened when you arrived at the intersection, now, of Coal Valley Road, and started to turn off Highway 108?

A. Well, about the first thing I seen was this mob starting beating Johnny Cain.

Q. Now, you've told us, all right, who Johnny Cain is. When you arrived there where was Johnny Cain?

A. He was—his car was just barely pulled off of 108 Highway, headed in towards the Coal Valley Mine, and he was standing, kindly to the side of the left front fender on his car.

Q. And where did this caravan that you were in stop?

A. They just pulled off of the main highway into the woods, or anywhere they could get stopped.

Q. Where did you go and what did you do?

A. I just barely pulled off to the left of the 108
34 Highway where it leads into Coal Valley Road, just kind of got back in my pick-up off of the State Road, and stopped.

Q. At the time you arrived there how many men, will you give us the approximate number that was in this group, or mob, or gang, or in that immediate area?

A. When the full group was congregated together I'd say there was approximately 200 of them.

Q. State whether or not there were any firearms present at that time.

A. No. I didn't see any over there.

Q. But did those that went over with you have firearms?

A. They put them all in their cars when we started to leave.

Q. Now, tell us exactly what happened in relation to Mr. Cain when you arrived at the scene there?

A. Well, this mob started cursing him and me and they was going to make us fight.

Q. All right, sir. Go ahead.

A. So the first thing I knew Bobby Banks hit Mr. Cain under the chin and he hadn't no more than whirled around when Bo McGwirt hit him, so he just got straightened up a little bit and here come Eli Hue Meeks down from behind and hit him in the back of the head.

Q. All right, sir. Go ahead.

A. And after they cursed and beat him around there awhile they made him take all of his personal papers
35 out of his brief case, take them over there on the bank, pile them up, set them afire, and put his brief case on there and burned it up.

Q. And did they burn all this stuff up in your presence?

A. Yes, sir.

Q. In his presence?

A. Yes, sir.

Mr. Rayson: Your Honor, we object to this testimony and make a motion to strike it.

Mr. Van Derveer: Now, we assure the Court that we'll make that testimony relevant.

The Court: Of course, ladies and gentlemen, until it is in some way related to the defendant in this case we must not consider the testimony. However, I want to reserve at this time any ruling upon the objection and see whether or not it is at any time connected up with this defense.

Q. Now, after that where did Mr. Cain go?

A. He left there, going to George Ramsey's.

Q. Now, at this point let's identify Mr. Ramsey. Who is Mr. George Ramsey?

A. He is a strip-coal operator.

Q. Where?

A. Over near Tracy City.

Q. What size mine does he have?

A. He produces about approximately a thousand or twelve hundred tons of coal a day.

36 Q. Would you say that's a small, big, medium size mine?

A. Well, that's a fair operation there on that mountain.

Q. Uh-huh. And as far as you know, that's where he was headed when you last saw him?

A. Yes, sir.

Q. Where did you go?

A. Well, after they finally agreed to turn me loose I went home.

Q. Did any other events take place that date, that is the 16th day of August, in relation to this group or this mob?

A. Well, they, this mob, they went on through Palmer with me, over to 185th or sixth junction, within about eight miles of my home, before they released me.

Q. Was there some in front of you and back of you?

A. Yes, sir.

Q. And then, how did they release you?

* * * * * * *

Don't, unless we specifically ask you, say anything else about what anybody told you, but just what happened.

A. Well, I just went home.

37 Q. All right. You went home then. After that were you able to go in on the Gray's Creek Road and open those mines?

A. No, sir.

* * * * * * *

Q. What did you see the next time you went by there?

A. The next time I was by that mine there I seen several men at a little shack, right here at this road where it goes into Gray's Creek Mine.

Q. Did they have arms?

A. Well, not that I could see, no, sir. I just drove by there and . . .

Q. Did you try to go in and open those mines?

A. No.

* * * * * * *

38 Q. That's right. How long did this group stay there at the entrance of Gray's Creek Road?

A. I'm not positive, but I think it was about March or April of 1962—I mean '61.

* * * * * * *

Q. Have you ever—did you complete your job with the Grundy Mining Company?

A. Never did go any further. No.

Q. All right, sir. Now I believe that you told us that these events are in relation to the mine down on the

Gray's Creek Road. You had some mines on down the Pocket Road I believe you told us?

A. That's correct.

Q. Now, prior to this, prior to the 15th and 16th of August, 1960, state whether or not you made frequent trips into your own mines there on the Pocket Road?

A. Before?

39 Q. Yes, sir.

A. I was there everyday.

Q. After this, that is the 15th and 16th of August, did you continue to make those trips?

A. No, sir.

Q. Why?

A. Just for fear that I might get killed.

Q. Did your mines continue in operation down there?

A. Yes, sir.

Q. But you just didn't go down there, is that it?

A. No, sir.

Q. Now, Mr. Gibbs, you've told us that you've been in the Coal Mining business over there for many years, haven't you? At the time of these incidents, or this incident, you told us, I believe, sir, that you had certain leases with The Tennessee Products and Chemical Corporation, is that correct?

A. That's right.

Q. After this, what happened to those leases?

A. Cancelled.

* * * * * * *

40 Q. Did you have a written lease with The Tennessee Products and Chemical Corporation on the lands involved?

A. Some of the time they issued written leases and some of them was verbal.

Q. Now these two leases which have been designated for

the purposes of the record in this correspondence as Numbers 2-074 and 2-075, were those oral leases?

A. Yes, sir.

* * * * * * * *

Q. At the time of this incident, now, speaking, now, of August 15th and 16th, 1960, did you have any written leases with Tennessee Products and Chemical Corporation.

A. I think I did at that time. The reason of this written was, it was to maintain an insurance guarantee.

Q. All right, sir?

41 A. To identify each mine by name, they took this list of names of the mine operators and the mines, and furnished this copy to the insurance company where they could keep them separated, and then they gave us a copy of it. . . .

Q. Now, so the Court and jury can understand that. You mined the coal but who, who marketed the coal?

A. Tennessee Products.

Q. Tennessee Products?

A. They allowed me to sell some at the intervals, when they didn't have a market for it, and I sold some of it to Dewey Trussell.

Q. All right. Now, for how many years had you been doing business with Tennessee Products without any difficulty whatsoever on any leases or getting leases?

A. Since July 17, 1953.

Q. Now, before this incident of August 15th and 16th, 1960, had you ever had any trouble at all with Tennessee Products, on getting land to mine coal?

A. No, sir.

Q. Whether it be oral or written. Is that correct?

A. Never did have any trouble.

Q. All right. Now, on the 15th and 16th of August, 1960, did you have any written lease or were . . . what was

the arrangement of which you were leasing this land designated as 2074 and 2075? Were those oral or written?

* * * * * * *

43 Q. I'll hand you these two letters and see if you can identify them, if so, hand them to the reporter for marking, and then read them each to the jury?

A. Yes, sir. I can identify them.

Mr. Van Derveer: All right, now mark the first one 13 and the next one 14.

Mr. Kramer: May it please the Court. We object in suggestion of these two instruments, the purpose of which have been stated, Your Honor, and I'll not repeat at the moment, because they refer to written instruments, the failure to produce which, has not been properly accounted for or explained so as to make these papers cancelled, admissible. The mere fact that the man says I don't know where they are, and these letters which I would like Your Honor to look at first, perhaps before you rule on our objection, explain why, our objection, we think, is good.

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48 The Court: For the purpose of the record, gentlemen, in the Court, just before the noon recess, an objection was made in respect to certain letters that the plaintiff tendered, the Court is sustaining the objection of the defendant, to those letters, on the grounds that the letters are hearsay, but the plaintiff will be permitted to put the letters into the record for identification.

(Plaintiff's Exhibits No. 13 and No. 14 received for identification purposes only.)

Q. At any rate, Mr. Gibbs, these leases were cancelled, weren't they?

A. Yes, sir.

* * * * * * *

49 Q. Had you ever had any difficulty before?

A. No, sir.

Q. Now, upon the cancellation of these leases, did you try to obtain other lands of The Tennessee Products and Chemical Company, upon which to operate the mines?

A. Yes, sir.

Q. Were you able to do so?

A. No, sir.

Q. Prior to this, had you always been able to do so?

A. Yes, sir.

Q. Tell us, if you can now recall, sir, the officials, or what officials, with The Tennessee Products and Chemical Company, you talked to, in an effort to get some leases?

A. Mr. Howard C. Human.

* * * * * * * *

50 Q. Have you been able to successfully negotiate any other lease with Tennessee Products?

A. No, sir.

Q. Now, let's move over, Mr. Gibbs, if you will, sir, to The Tennessee Consolidated Coal Company. On the 15th and 16th of August, the incident that you told us about, did you then, at that time, have any sort of a lease for coal mining with Consolidated?

A. No, sir.

Q. After that, did you attempt, or try to get lands, upon which you could work, from Consolidated?

A. Yes.

Q. Were you able to do so?

A. Not at the present time, but I did later.

Q. Did you try few or many times?

A. Many times.

Q. And without telling us what was said, tell us the officials with Consolidated Coal, that you tried to get some lands to mine, from?

A. Mr. Paul Callis, the President of The Tennessee Consolidated Coal Company.

Q. Who else, sir, if anyone?

A. And Mr. Houston Beaumont, he was Vice-President.

* * * * * * *

51 Q. And do I understand you correctly, to say that you asked them few or quite a number of times?

A. Quite a number of times.

Q. Now, at any time, were you able to execute a lease arrangement with Consolidated, so that you could mine coal?

A. Not alone, I wouldn't. I had a joint lease.

Q. Now, when you say that this was after August 15th, am I correct?

A. (Nodded yes.)

* * * * * * *

Q. Now, were you able to execute a lease?

A. Yes, sir.

Q. Who, if anyone, was on the lease, with you?

A. Mr. Herman Sanders.

52 Q. Who is Mr. Herman Sanders?

A. He's a truck operator in a coal mine over there at Monteagle, Tenn.

Q. Now what was the reason or the purpose of you obtaining Mr. Sanders to go on this lease with you?

A. Well, I couldn't obtain the lease by myself.

Q. What sort of working arrangement, if any, did you enter in to with Mr. Sanders, in order to get a lease from Consolidated Coal?

A. We didn't have any, then.

* * * * * * *

53 Q. Were you, other than this one lease with Mr. Sanders, that you told us about, able to get any other lands with Tennessee Consolidated?

A. No, sir.

Q. Now, as coal mines go, some of yours are good, some are bad, and some scavenger, aren't they?

A. That's right.

Q. Now what do we mean when we say that?

A. Where you say good coal land, that's virgin territory, and probably hasn't ever been worked, see. The scavenger, as you called it, that's old workings where we thoroughly stripped it, it's already been mined.

Q. Yes, sir?

A. And just leaves blocks of coal now and then.

Q. The lease that you were able to work out with Mr. Sanders and Consolidated, would you define it as what type coal land? The good?

A. Poor.

Q. All right, now, where was the lease that you were able to work out with Mr. Sanders, or where were the lands?

A. It's in Marion County.

Q. Wait a minute. In relation, now, to Dogwood Flats, over here, where the incident of August 15 or 16, 1960, happened?

A. Well, I'd say it'd be thirty-five miles east of there.

Q. Over near where?

54 A. Tracy City.

* * * * * * *

Q. Was the area that Consolidated finally did give you a lease, as far away from 5881 as they owned any land?

A. Yes.

Q. Now, Mr. Gibbs, you have before us that on
55 August 15th and 16th, you had, I believe you said, eight trucks, did you not?

A. That's right.

Q. And you've also told us that you've been unable to

get any leases with Consolidated and had certain leases cancelled with Tennessee Products. Now, what did you do with your trucks?

A. Repossessed. Three of them.

Q. Now, when you say they were repossessed, tell us what trucks were repossessed, and by whom?

A. Three of those tenners were repossessed by the Allison Motor and Equipment Company.

Q. Is that Allison Motor and Equipment here in Chattanooga?

A. Yes, sir.

Q. What do you mean when you say the three tenners? Is that three of the big trucks?

A. Yes, sir.

Q. Now, in addition to property of Products and Consolidated, did you try to get some lands from Grundy to work on?

A. Yes.

Q. Were you able to do so?

A. No, sir.

Q. And, in your attempt to get these lands from Grundy, who did you deal with?

A. Mr. Paul Callis, and Mr. Houston Beaumont.

Q. The same officials with Consolidated?

56 A. Yes, sir.

Q. Now, let's get back to the trucks just a moment. When you could find no further mines to work, did you attempt to get haulage from other mines?

A. Yes, sir.

Q. Now, I'm sure the jury understands by now, the two big coal companies over there. What other companies were there, in that immediate area that were operating and that would have been prospects for you to have gotten certain haulage from?

A. Well, I asked Mr. George Ramsey about some haulage.

Q. Now, you identified Mr. Ramsey before, as having a mine, I believe you said——

A. A strip mine.

Q. A strip mine of about twelve hundred tons a day, I believe?

A. Yes.

Q. Now, where was his mine?

A. It's in Grundy County, between Coldwater and Tracy City.

Q. Prior to August 15 and 16, 1960, had you ever done any hauling for Mr. George Ramsey?

A. Yes, sir.

Q. Now, his mine is located in a different area, of course, from the Gray's Creek Mine, and when you did this hauling before, where did you haul his coal to?

A. To the best of my knowledge, I think I was
57 taking the coal, at that time, to two different points. That's Penn-Dixie Cement Plant over at Richard City, and the T. V. A. at Widows Creek Steam Plant.

Q. Now, the T. V. A., Widows Creek Steam Plant, is that, in the trucking business, considered a good haul?

A. Fair.

Q. A long haul?

A. It was a long haul.

* * * * * * *

Q. Now, after the 15th and 16th of August, and you had these trucks, did you again go to Mr. Ramsey
58 and try to get some haulage?

A. Yes, sir.

Q. Were you able to get it?

A. No, sir.

Q. You talked to Mr. Ramsey, yourself?

A. Yes, sir.

Q. Was he, at that time, letting other people haul coal for him?

A. Yes, sir.

• • • • • • • •

Q. Do you know who Mr. Ramsey had a contract with or where he was selling his coal?

A. Yes, sir.

Q. Who?

A. He was selling coal to Marquette Cement Plant in Cowan.

Q. And anyone else?

A. T. V. A., Widows Creek.

• • • • • • • •

59 Q. Of your own knowledge, from what you saw of Mr. Ramsey's mine, and I believe you know him quite well, do you not?

A. Yes, sir.

• • • • • • • •

60 Q. From your own personal knowledge, was Mr. Ramsey then contracting out part of his haulage?

A. Positively, he was.

Q. At that time, did you have trucks that you could have hauled with? Hauled some of Mr. Ramsey's coal?

A. Absolutely.

Q. At that time, do you know whether Mr. Ramsey was looking for someone to haul some coal?

A. Yes, sir. I know that to be positive.

Q. Now, were you able to get the business?

A. No, sir.

• • • • • • • •

61 Q. What other mine owners or operators, if any, actually offered you a contract, but were unable to fulfill it?

A. Nobody.

• • • • • • • •

Q. Were you able to get any haulage contract anywhere in the area?

A. No, sir, not coal.

Q. Did you ask everybody over there?

A. Yes, sir.

62 Q. And, in an effort to try to keep your trucks, what did you do?

A. Well, we had an account with the Yellow Motor and Company in Atlanta, over two year contract, and I got to where I couldn't meet the payments, so I got The American National Bank to buy the contracts and that extended the payments for 45 days, and during the time I made 2 or 3 payments on them, then took the payments up and paid the interest on them, and then I wind up they repossessed three of them.

Q. Now, in an effort to keep those trucks, did you go ahead and haul anything other than coal?

A. Yes, sir.

Q. What, when, and where?

A. I hauled some sand and dirt over on Interstate 24, beyond Monteagle, from about June of '61, off and on, it wasn't a regular haul, but that lasted up in to November of '61.

Q. But other than that haulage, is that the only haulage contract that you were able to get?

A. Absolutely.

Q. Now, Mr. Gibbs, I'm going to hand you here what purports to be certain income tax returns for the years 1956, '57, '58, '59, '60 and '61. Would you see if you can identify these? I'll ask you to look at each of them and see if those are your income tax returns?

A. Yes, sir, they are.

63 Q. I'll ask you if you'll identify those, give them to the reporter, and beginning with 1956 return, mark each of them a separate exhibit.

A. Yes, sir.

(Plaintiff's Exhibits No. 15, No. 16, No. 17, No. 18, No. 19 and No. 20 tendered and received in evidence.)

Q. Mr. Gibbs. To go back just one moment here, I've overlooked my point here. In addition to trying to get contracts of haulage from Mr. Ramsey or anyone else, did you try to buy coal from Mr. Ramsey?

A. Yes.

Q. Would he sell it to you?

A. No, sir.

Q. Who else, in that area over there, did you try to buy coal from, and were refused the sale, of course?

A. Mr. Lawrence Debbs.

Q. Who is he?

A. He's another strip operator.

Q. Who else did you try to buy coal from?

A. I had to go about forty miles on out the road and buy it from the Stugger Brothers.

Q. All right, sir. Now, in other words, they just even refused to sell you coal?

A. Right.

Q. Now, Mr. Gibbs, you introduced into evidence here, your Income Tax Returns for the year of 1956 through 1961. Now, let's limit the next few questions to the damage aspect, if any, of the Grundy Mining incident, and you've heretofore testified, I believe, that Mr. Judson Harwood told you he'd pay you six hundred dollars per month, is that correct?

64

A. That's right.

Q. Now, what amount, if any, did he pay you?

A. He paid me for two weeks—three hundred dollars.

Q. Is that all that you ever got from him?

A. That's all.

Q. And was that paid by The Grundy Mining Company?

A. Yes, sir.

Q. Now, you've also alleged here, about certain haulage at seventy-eight cents a ton, is that what they had told you there?

A. That's what he told me he'd pay me.

Q. Now, out of that seventy-eight cents per ton, what were you to pay? Your upkeep, maintenance, or what?

A. Upkeep of the trucks, gas, oil, driver, insurance.

Q. Now, a few pin-pointed questions, and let's see if we can arrive at what that would have amounted to. How long would it have taken you, from August the 15th or 16th, if they'd let you alone, to have gotten this mine in actual operation?

A. Approximately two weeks.

Q. How many tons of coal per week would the mines have produced when opened?

65 A. Well, the scale——

Mr. Rayson: Your Honor. Again is this speculation on the part of the witness. There are no facts, whatsoever, that show that what the——

The Court: I believe you may cross-examine him on those matters. I believe we'll overrule the objection.

Q. Again, how many tons of coal per week would the mines have produced, when opened?

A. Each mine would produce two hundred tons per day, per shift.

Q. And how many shifts per day would you have worked?

A. Two.

Q. For a total, daily production of how many tons?

A. Ten thousand tons a week.

Q. And how many days per week did you work?

A. Five days.

Q. Two thousand tons per day?

A. That's right.

Q. Now, those estimates, Mr. Gibbs, are those to the

extreme, one way or the other, or do you base that upon your thirty odd years over there?

A. I'll base that on my years of experience.

Q. How much were you to receive for each ton of coal hauled?

A. Seventy-eight cents.

Q. How many tons of coal would be hauled for
66 each load of coal per truck?

A. I tried to average about twenty-two tons per load.

Q. Now, how many trucks would you have operated in this Grundy Contract?

A. All eight of them.

Q. Now, when you say all eight of them, do you mean single shift, or all eight of them on double shift?

A. It would have been a double shift.

Q. How much would you have paid your truck drivers?

A. Minimum wages. It would have been $2.51½ cents an hour.

Q. That's twenty dollars and twelve cents per man, I believe, isn't it?

A. That's right.

Q. Of course, that's per shift, isn't it?

A. That's right.

Q. On a double shift. And you've already told us, now, that you would have worked five days a week, is that right?

A. Absolutely.

Q. Now, where would you have hauled this coal to, that is from the Gray's Creek Mine to where?

A. To Palmer, to the tipple.

Q. Tell the jury what a tipple is.

A. A place where it's built up to back a truck out on,
it with a load of coal, where you can dump it
67 directly into a railroad car.

Q. How far is the tipple from where you would have had to loaded the trucks?

A. Approximately, ten miles.

Q. So, round-trip, it would have been twenty miles?

A. Yes, sir.

Q. What is the average mile per gallon of gas on each of those trucks that you would have run?

A. Three miles per gallon.

Q. How many trips would each shift make per day?

A. Seven.

Q. Now, when you say seven, you mean seven round trips?

A. Per truck, per shift.

Q. Yes, sir. What was the price of the gas that was used in these particular trucks?

A It cost me thirty cents a gallon wholesale now, and did then.

Q. Now to operate one of these trucks, how much oil and grease would it take per week, per truck?

A. Six dollars per truck.

Q. Now, to operate one of these trucks, how much would it cost per year, for the tires and the tubes?

A. Approximately a thousand dollars per truck. Those were awfully rough roads.

68 Q. How much would your workmen's compensation insurance have cost you on the men that you had employed?

A. Two dollars per hundred on each payroll.

Q. That was two dollars on an audited payroll, wasn't it?

A. That's right.

Q. How much increase in your telephone bill would it have cost you, in your best judgment, to have operated this—completed this operation?

A. Approximately twenty five dollars above what it would actually cost.

Q. How much would your truck repairs have lost you per year on all the trucks that you would have used on this particular contract?

A. Twelve thousand dollars a year.

Q. And, do you base that upon the income tax returns, actual deductions that you have introduced?

A. Yes, sir.

Q. How much would it cost to keep these trucks repaired, and in an operating condition, working two shifts per day? That's a figure that you've given us, I believe, at twelve thousand dollars?

A. That's right.

Q. Now, how much would your payroll tax be?

A. Unemployment cost me four percent, Social Security——

Q. Now, after you paid those expenses, and Grundy would have paid you the seventy eight cents, the
69 difference would have been profit to you, is that correct?

A. Yes, sir.

* * * * * * *

80 Q. Now, let's leave that topic for a moment, Mr. Gibbs. Do you need some more water?—and move over to—and you have told us that you have been unable to get any further leases from Consolidated, so that you could work in that area, is that correct?

A. That's right.

Q. But, that you do have this one particular lease with Mr. Herman Sanders?

A. That's right.

Q. Now, is the profit or loss from that lease, or whatever——

A. Loss.

Q. It was loss. Is that included in your income tax return?

A. No. Just a little bit of it was last year. We didn't start operating until November of last year.

Q. Of November of last year?

81 A. Yes, sir.

Q. But you have been operating, that is you and Mr. Sanders have been operating for the year of 1962?

A. I've been operating. Mr. Sanders doesn't enter the picture.

* * * * * * * *

82 Q. Now, Mr. Gibbs, there are other choice areas over
83 there of coal lands, are there not?

A. Not in the area where I am.

Q. No. I mean back in the Gray's Creek area?

A. Yes, sir.

Q. And I believe that you have testified, have you not, sir, that part of those lands, or that land, is owned by The Tennessee Consolidated Coal Company, from whom you tried to get a lease and couldn't?

A. Yes, sir.

* * * * * * * *

96 Q. Mr. Gibbs, now, back to the facts that took place in that area on the 15th and 16th of August, 1960, in the Gray's Creek area, state whether or not you saw any official of the International Union?

A. On what date?

Q. The 15th or the 16th?

A. Well, everything happened so fast there, I'm thinking that I seen Mr. Gilbert drive up there, but where he went, I don't know.

Q. Now, who is Mr. Gilbert?

A. He was a representative of District 19.

Q. Now, may it please the Court, I think now would be a good time, with the agreement of opposing council, to

read into evidence the stipulation. With the Court's permission, we will do so. It is as follows: For the purposes of this case, it is stipulated by the parties, the defendant, United Mine Workers of America, is responsible for the acts of representatives of District 19, United Mine Workers of America, perform within the scope of their employment as such representatives. What part did this Mr. Gilbert play in the activities in which you were involved in, there that day?

A. He didn't play any part that I seen.

Q. Not that day. You saw his car there?

• • • • • • • •

97 Q. Did you see his car there?

A. To the best of my knowledge, yes.

Q. Now, what was the next communication that you had with Mr. Gilbert or any other official of the International Union?

A. A telephone conversation with Mr. Gilbert.

Q. Now, when was that?

A. On the 18th day of August, 1960, on Thursday.

Q. On Thursday, and where were you, and if you know, where was Mr. Gilbert?

A. Mr. Gilbert was at home, and I was at Mr. Herman Sanders.

Q. You were at Mr. Sanders' home and Mr. Gilbert was at home. Who called who?

A. I called Mr. Gilbert.

Q. Did you know him?

A. Yes, sir.

Q. If you will, Mr. Gibbs, give us the benefit of the conversation there with Mr. Gilbert that night.

A. Well, he was supposed to have met me for a conversation with me, out there at the Monteagle Cemetery, and he didn't show up.

Q. What did you say to him, or what did he say to you?

A. I called him and asked him why he didn't show up, and he said, "Well, I was busy". I said "well
98 what do you want with me?" He said, "I want you to keep your damn hands off of that Gray's Creek area over there, and tell that Southern Labor Union that we don't intend for you to work that mine."

Q. What else transpired, if anything?

A. Well, that was just about the extent of the conversation, after he didn't show up.

Q. Was anyone there with you at the time that can authenticate that conversation, or knows about it?

A. Mr. Herman Sanders was there with me.

Q. He heard the conversation?

A. I think so.

Q. Now, Mr. Gibbs, is the mine there at Gray's Creek operating today by Grundy Mining Company?

A. Yes, sir. It is.

Q. How many mines do they have in operation there?

A. To the best of my knowledge, they have eleven at the present time.

Q. Have you been offered employment there?

A. I've asked for it.

Q. Have you been able to obtain it?

A. No, sir.

Q. Now, the seeing of Mr. Gilbert, as you've described, and the phone conversation with Mr. Gilbert, in relation to this incident, have you had any other conversation with Mr. Gilbert?

A. To the best of my knowledge, I called in about
99 two days later, and asked him to try to get a revolver back that somebody had solen out of my pick-up, over there.

Q. What was the outcome of that conversation, and what else transpired?

A. He said he didn't know anything about the gun. Said he had heard, probably, a little discussion about it, and said if he could get it back, he'd be glad to, and give it back to me.

Q. What, if anything, was said about what happened out there that day, or whether you would be permitted to work?

A. It wasn't discussed on that day at all.

Q. Now, that was the second telephone conversation?

A. Yes, sir.

Q. Did Mr. Gilbert ever actually meet with you?

A. No, sir.

Q. So the two phone conversations are the only thing that you know in that regard?

A. That's right.

Q. When did Mr. Gilbert leave that area, and when did Mr. Madewell take over?

A. I think that's beyond my knowledge; I don't know the exact time.

Q. Is Mr. Gilbert still there?

A. No, sir.

Q. Who did replace him?

A. Howard Madewell.

100 Q. Mr. Madewell. Now, in addition to Mr. Madewell and Mr. Gilbert, what other International representatives, to your knowledge, have you seen over there, in and around the coal fields and these Locals?

A. Nor anybody, that I can recall.

Q. Those two are the only ones?

A. Yes, sir. Since that time, I've seen more over there at different intervals.

Q. Who?

A. Mr. Bill Turnblazer and Mr. Riden. . . .

Q. Now, wait a minute. Mr. Turnblazer is the gentleman sitting here?

A. Yes, sir.

Q. Where were . . . sir?

A. Mr. Albert Pass.

Q. Let's slow down a little bit. What was the occasion when you saw Mr. Bill Turnblazer?

A. I believe he was over there during the time we was negotiating the contract.

Q. Was that before August 15 or after August 15?

A. Before.

Q. Do you know how long before?

A. Well, to the best of my knowledge, I seen him there in October of 1955, and October of 1958.

Q. And, now, you've told us that you have seen
101 Mr. Ridings there. Again, who is this Mr. Ridings?

A. He's some official of the District 19, out of Middlesboro, Kentucky.

Q. Do you know what position he holds with District 19?

A. I believe he's President, to the best of my knowledge.

Q. What were the occasions that you saw Mr. Ridings over there in the field?

A. Trying to get this contract signed.

Q. Now, when you say "this contract", do you mean the contract with Tennessee Consolidated Coal, that was terminated on March 15, 1960?

A. With The United Mine Workers.

Q. The United Mine Workers contract . . .

Mr. Rayson: We object, Your Honor. The witness has strayed from 1955 to 1958, about some contracts to be signed, none of which seem to be material to this case, and . . .

Mr. Van Derveer: Well, we think '55, we go back too far, but we think '58 is very relevant. Very relevant.

The Court: Well, proceed.

Q. You've seen Mr. Ridings. Now, you told us that you saw a Mr. Pass, I believe, too. Who is this gentleman?

A. Secretary and Treasurer of District 19 at Middlesboro, Kentucky.

Q. And what were the occasions when you saw him there?

A. Trying to get this contract signed with The
102 United Mine Workers.

Q. Now, pin-point that on the date, the best that you can.

A. To the best of my knowledge, it was right around the 25th of October, 1958.

Q. Other than the officials that you have told us, from District 19, or the International, have you seen others over there, so far as you know?

A. Yes. I seen Mr. Condra over there. I don't know his given name or what position he held with the union.

Q. Did you know who he was with?

A. He was with some of the representatives of District 19. He was with these folks that I just mentioned.

Q. Can you think of any others that you have seen there?

A. No, I can't. Not at the present.

Mr. Van Derveer: May it please the Court, we have two exhibits here, that we would like to offer into evidence, under the Business Records Act, which purport to be reports which have been filed on The United Mine Workers of America, in accordance with the Taft-Hartley Act. Opposing counsel has seen them and is familiar with them.

Mr. Rayson: We, however, contend, your Honor, that they have no materiality, but we are willing for your Honor to look at them. We think they can't accomplish any purpose, and are material.

Mr. Van Derveer: We think they are most relevant
103 on one agency; the part that the International played in, which ties in directly with Mr. Gibbs testimony, and . . .

The Court: Do you propose to examine this witness about these exhibits?

Mr. Van Derveer: No, Your Honor.

The Court: Very well, then. Allow the exhibits to be introduced for identification only, at this time, and we will take up, again, after we excuse the jury, whether there is anything material, or not.

Mr. Van Derveer: Twenty one and twenty two.

The Court: How are you going to distinguish between them?

Mr. Van Derveer: The 1960 date will be 21, and the '61 date will be 22.

(Plaintiff's exhibits No. 21 and No. 22 tendered and received for identification purposes only.)

Mr. Van Derveer: I would also like to read into evidence, may it please the Court, from an interrogatory No. 3, by the defendant union. I would like to read both the answer, I mean the question, and the interrogatory answer.

* * * * * * *

Mr. Van Derveer: The interrogatory and answer follows, Interrogatory No. 3: List below the officers,
104 president, vice-president, financial secretary, and otherwise, of the local in the Palmer area for the year 1960. Answer: The defendant objects to that portion of this interrogatory, at which refers to any period of time, other than the year 1960. In response to the remaining portion of this interrogatory, defendant answers as follows: The officers of Local Union 5881 are Walden Shrung, President; James Fults, Vice-President; Frank Scruggs, Recording Secretary; Alder Brewer, Financial Secretary; Albert Nunley, Treasurer; and Robert King, Doorkeeper. The officers of Local Union 7083 are Herman Dykes, President; Robert Sweeten, Vice-President; Johnny Lynn, Re-

cording Secretary; Brian Parmley, Financial Secretary; A. C. Green, Treasurer; and Willie Ramsey, Doorkeeper.

Q. Now, my question, Mr. Gibbs. Which of those men, if any, was in this mob, there, on the 15th or 16th?

A. Of the first group or the last?

Q. Any that I have mentioned.

A. Yes. There are several of them.

Q. Now, name those that you remember seeing, or I'll ask you, person by person. State whether or not you saw Mr. Walden Schrum there?

A. Yes, sir. He was there.

Q. Mr. James Fults?

A. Yes, sir. He was there.

Q. Mr. Frank Scruggs?

105 Yes, sir. He was there.

Q. Mr. Alder Brewer?

A. Yes, sir.

Q. Mr. Albert Nunley?

A. I don't recall seeing him.

Q. Mr. Robert King?

A. I don't know.

Q. Do you know him?

A. No, sir.

Q. Now, of Local Union 7083, state whether or not in that group, either on the 15th or 16th you saw Mr. Herman Dykes?

A. I don't know him either.

Q. Mr. Robert Sweeten?

A. I don't know him.

Q. Mr. Johnny Lynn, or L-e-y-n-e?

A. I don't know him either.

Q. Mr. Brian Parmley?

A. I can't recall seeing him there. I know him.

Q. Mr. A. C. Green?

A. I don't know him either.

Q. Mr. Willie Ramsey?

A. I don't know him.

Q. You don't know those?

A. No, sir.

Mr. Van Derveer: I'd like to read into evidence,
106 may it please the Court, the interrogatory No. 20 and the answer to it.

Mr. Kramer: No objection.

Mr. Van Derveer: Interrogatory No. 20 is as follows: Set forth below, the amount of money, spent by either the International Union, or District 19, for strike benefits with a complete breakdown, item by item, in the Whitwell area for the years 1958 through 1960. The answer is: The International Union did not expend any money for strike benefits in the Whitwell area, in the years 1958 through 1960. According to the information and belief of the undersigned, District 19 expended approximately $1,020.00 for relief of distressed members of Local Union 8128, during the period, May 24, 1960, to June 13, 1960.

Q. Now, my question, Mr. Gibbs, is, during this time, that is, May and June, 1960, was a picket line maintained by the Union there, at the entrance to Gray's Creek Road?

* * * * * * * *

Q. State whether or not there was a picket line up there during those times.

A. No, sir. There was not.

107 Mr. Van Derveer: I'd like to read into evidence Interrogatory No. 21, please the Court. Without objection, it is as follows: Set forth below, the amount of money spent by either the International Union or District 19 for strike benefits, with a complete breakdown, item by item, for the Palmer area, for the years 1950 through 1950. Answer: The defendant objects to the portion of this interrogatory that relates to any money spent by

District 19, and to that portion that relates to any year, other than the year of 1960. In response to the remaining portion of this interrogatory, defendant answers as follows: The International Union did not expend any money for strike benefits in 1960. According to the information and belief of the undersigned, District 19 expended approximately $24,500.00 for the relief of distressed members of Local Unions 5881 and 7083. This office does not have any record showing item for item breakdown of the funds expended for District 19 for this purpose. I'd like to now read into evidence, may it please the Court, Interrogatory No. 9, with the answer to it.

* * * * * * * *

108 **Cross-Examination,**

By Mr. Rayson:

Q. Mr. Gibbs, as I understand it now, you had two mines operating on Tennessee Products lands in 1960, about the time of this Gray's Creek incident on Grundy's lands, is that correct?

A. Yes, sir.

Q. Did your employees belong to The United Mine
109 Workers Union?

A. They sure did.

Q. What local union did they belong to?

A. 7083.

Q. They continued to work, though, without interruption, after that time, did they not?

A. Well, they had interruption, but I couldn't explain just what happened, cause I wasn't there.

Q. Did you continue to pay them every week?

A. Yes, sir.

Q. No strikes at your mine at all, was there?

A. No, sir.

Q. Your employees went to work every day, every work day?

A. That's right.

Q. And in fact, they went right across this picket line, that you said you saw until sometime in March or April or 1960, didn't they?

A. Yes, sir. They passed there.

Q. And finally they stopped working for you sometime in 1961, didn't they?

A. That particular group did, Yes, sir.

Q. And the reason they stopped working for you at that time, was that the mine that they worked in, at least one of them worked out. In other words, you mined all the coal that was in there, isn't that right?

110 A. In that particular mine, yes, sir.

Q. And that was when that lease, you say, was cancelled by Tennessee Products?

A. No. Not that one. No, sir.

Q. Well, it was cancelled then wasn't it?

A. Not that one, no, sir.

Q. The other lease that you were talking about on Tennessee Products, was cancelled sometime in September of 1961 or even in 1962, it was one of those two dates, wasn't it?

A. It wasn't 1962. No, sir.

Q. 1961?

A. Yes, sir.

Q. September of 1961, is that when you say?

A. Yes, sir.

Q. Some year after. More than a year after all this trouble you're complaining about at Grundy in 1960, is that right?

A. That's right.

Q. And you have not had any trouble with Tennessee Products in the meantime?

A. Haven't had any trouble with them?

Q. You have not had any trouble, you testified, with Tennessee Products, in the meantime.

A. That's right.

Q. And this came as a surprise to you when your leases were cancelled in September?

111 A. Yes, sir.

Q. Why, Mr. Gibbs, didn't you have some trouble with the Tennessee Products entirely unrelated to these matters in the springtime of 1961?

A. You're talking about some trouble on another job, I suppose.

Q. I'm talking about with your relationship to Tennessee Products and Chemical Corporation?

A. Nor according to the mining. No, sir.

Q. You say you didn't have any trouble with them at all?

A. I didn't say that. I said it wasn't pertaining to the mining.

Q. Didn't you file a lawsuit against Tennessee Products and Chemical Corporation in September of 1961, for some two hundred and seventy-five thousand dollars, or some such figure as that?

A. Yes, sir. I sure did.

Q. Just a few days before these leases were cancelled, didn't you? Isn't that right?

A. I said so.

Q. Now, in the summer of 1960, you had eight trucks?

A. That's right.

Q. How long had you had eight trucks?

A. How long had I had them?

Q. Yes, sir.

112 A. Well, I've owned seven or eight trucks for a period of years, but they were small ones.

Q. But you got some large ones sometime around 1960 or 1959, didn't you?

A. I bought some large trucks in March of 1959.

Q. You bought those trucks in 1959, when you started hauling coal from The Pikeville Coal Company, didn't you?

A. That's correct.

Q. You used six of your trucks hauling coal from the Pikeville Coal Company?

A. That's right.

Q. You used the other two for hauling coal from your mine?

A. That's correct.

Q. On Tennessee Products' land. Is that right?

A. That's right.

Q. You continued to use all of those trucks, two of them on your job, and six of them on the Pikeville job, until March of 1961, didn't you?

A. That's right.

Q. The same eight trucks that you said that you had put at Grundy?

A. That's right.

Q. Even though you were under contract, then, to use them to haul coal from Pikeville Coal Company?

A. I was under contract, but I didn't have to keep
113 the contract, if I didn't want it.

Q. You mean you could surrender that contract at any time?

A. Absolutely.

Q. Yet, that's the same contract you have sued Tennessee Products for, for $275,000.00, isn't it?

A. For cancelling out on me and Pikeville Coal Company.

Q. All right, sir. So it was after the next contract was

cancelled by Tennessee Products in 1961, March of the year, wasn't it?

A. You mean after they cancelled the one with Price?

Q. That's right. Pikeville Coal Company contract. The one where you had six trucks in use?

A. It was about the third day of March, I believe, the last day we worked of 1961. I may not be correct in that, but I think that's about right.

Q. And you kept your trucks busy up until that contract was cancelled?

A. No, sir. I didn't.

Q. And it was after March of 1961, that your trucks were repossessed? That was after your contract to haul Pikeville Coal Company coal was cancelled, wasn't it?

A. Yes, sir. That's when I lost them.

Q. That's when you lost them. It didn't have anything to do with this. It had something to do with the Pikeville contract, didn't it?

114 A. I wouldn't have lost them if I had had this other job that I was offered.

Q. You had your eight trucks in use until the Pikeville Coal Company contract was cancelled?

A. No, sir.

Q. Isn't that what you said in your declaration that you filed in the Pikeville Coal Company case?

A. I didn't tell you I kept them steady at work. No, sir.

Q. I ask you, though, isn't that what your claiming in the Pikeville Coal Company case? Isn't that what you're asking Tennessee Products $275,000.00 for?

A. We made a contract, or Pikeville Coal Company did. . . .

Q. Yes?

A. With Tennessee Products, and it was supposed to run from five to eight years in all, and I had a separate contract with them for the hauling for this period of

time, and in the meantime, they cancelled the contract with The Pikeville Coal Company, and that automatically cancelled mine.

Q. Yes. And it was after that that you lost your trucks?

A. Yes.

Q. And that wasn't until sometime in March of 1961?

A. That's right.

Q. Mr. Gibbs, you have testified on two occasions, about the August 15 and 16, 1960 incident, before the National Labor Relations Board, didn't you?

115 A. Testified twice to them?

Q. Yes, sir.

A. I believe you're correct. I wouldn't be positive.

Q. And you have testified twice previously, in the preparation of this case, haven't you, under oath?

A. Yes, sir.

Q. And yet, this is the first time on this witness stand this afternoon, that you ever testified that you saw George Gilbert, or you even thought you saw George Gilbert there on those days, either of them. Isn't that correct?

A. If I didn't say that I seen him there, I hadn't been asked.

Q. You didn't say, you were asked who you saw there, and you have yet to say, until this afternoon, that you saw George Gilbert there, isn't that correct?

A. I don't know about that. I wouldn't make that statement.

Q. These men, that you do say that you saw out there, Walden Schrum, and some of the others, do you know them well?

A. Yes, sir.

Q. They were, let's see, Schrum was President of the local union, I believe.

A. 5881, yes, sir.

Q. 5881. Now, is that a full time job for Schrum?

A. I don't know about that part.

Q. He was a coal miner, wasn't he?

116 A. I presumed he worked in the mine, but what duties he had, and how much time it took, I don't know?

Q. He was a coal miner as were all these other men you saw, at The Coal Valley Mine, weren't they?

A. I never did see him working down there. I don't know.

Q. Now, you know Shrung, don't you?

A. Yes, sir.

Q. He married your sister, didn't he?

A. Some thirty some odd years ago, yes, sir.

Q. And these men all worked at Coal Valley Mine as far as you know?

A. As far as I know, yes, sir.

Q. And they thought that these were their jobs that were being taken that day, isn't that right?

A. I don't know.

Q. Don't you know that, Mr. Gibbs?

A. No, I don't know it.

Q. When you were called to go to work at Grundy Mining Company, by Grundy Mining Company, you were called by Judson Harwood, a lawyer, weren't you?

A. Yes, sir.

Q. He's a lawyer in Nashville, isn't he?

A. Yes, sir.

Q. He called you on the long distance telephone?

A. Yes, sir.

117 Q. Did you ever see Judson Harwood before that?

A. No, sir.

Q. Did you see him at any time before August the 15th?

A. No, sir.

Q. How many conversations did you have with Mr. Harwood before August the 15th?

A. I believe the one is all.

Q. Just that one conversation?

A. That's all I recall. Yes, sir.

Q. And this agreement that you worked out to superintend the mine for $600.00 a month, and to haul the coal for 78 cents a ton, was worked out on that one long distance telephone?

A. Absolutely.

Q. And that is the only conversation you had with anybody; with Tennessee Consolidated Coal Company or Grundy Mining Company concerning your contract prior to August 15?

A. That's right.

Q. And you didn't have any conversation with anyone about your contract of employment in between, did you?

A. No, sir.

Q. Now, when you went there that morning did you know who was going to be at work?

A. No, sir.

Q. You had no idea?

A. I knew some of them, but I didn't know them all.

118 Q. Did you talk to any of them?

A. Two of them. Yes, sir.

Q. You knew what The Grundy Mining Company was at that time, didn't you?

A. No, sir, I did not. I wasn't familiar with it.

Q. Didn't you know that that was part of Tennessee Consolidated Coal Company?

A. Well, to my knowledge, I knew they owned the land. Yes, sir.

Q. Yes. And you knew the men that were going to work there were not the regular Tennessee Consolidated employees, didn't you?

A. I knew that. Yes, sir.

Q. And you knew some of these people, Walden Schrum, for example, had worked there for as much as 35 years?

A. Not there. No, sir.

Q. On the lands of Tennessee Consolidated Coal Company?

A. That's correct.

Q. When you got out there Monday morning, August 15th, were you alone?

A. Yes, sir.

Q. Did you, when you got to the mine on the morning of August 16, were you also alone?

A. I didn't go to the mine on the 16th.

Q. Well, to the entrance to the mines, then?

A. I was alone when I came back. Yes, sir.

119 Q. Did you know where you were going to open these mines?

A. I most certainly did.

Q. Had you ever been there before?

A. No, sir.

Q. Did you have any equipment with you?

A. I didn't. No, sir.

Q. Did anybody make any arrangements for equipment to be there?

A. I don't know about that.

Q. You mean you didn't discuss that with Mr. Harwood when you talked to him??

A. No, sir, I didn't.

Q. Did you have any equipment with you or did you make any arrangements to take any equipment out there on the morning of August the 16th?

A. No, sir, I didn't.

Q. No arrangements were made about equipment?

A. Not to me. No, sir. Not at this particular time.

Q. You were going to be the man in charge, weren't you?

A. Yes, sir.

Q. What time did you get home on the 16th, August the 16th?

A. To the best of my knowledge, it was about eleven o'clock.

Q. In the morning?

A. Yes, sir.

Q. And what time was it that you say you talked to
120 George Gilbert that day?

A. I didn't talk to George Gilbert.

Q. It was on the 18th?

A. Yes, sir.

Q. The next Wednesday?

A. No, sir. Thursday.

Q. Thursday?

A. Yes, sir.

Q. And you called Mr. Gilbert that day?

A. Yes, sir.

Q. When was your second conversation with Mr. Gilbert?

A. The date I can't remember, but it was two or three days later after that.

Q. Now, I want to ask you some questions about your truck hauling business. These two mines that you operated on Tennessee Products lands, in the so-called Pocket area, you hauled the coal from those mines?

A. Yes, sir.

Q. In your own truck?

A. Yes, sir.

Q. Did you or did your trucks continue to go into those mines?

A. Yes, sir.

Q. Day in, day out?

A. Yes, sir.

121 Q. Crossed the picket line?

A. Yes. They never did bother the trucks. No, sir.

Q. They didn't bother anybody going to your mines?

A. They stopped my men one morning, yes, sir.

Q. They stopped them and they asked them where they were going, and they said, "The Paul Gibbs Mine," and they went on in, isn't that right, and went to work?

A. Well, now, you've got here—Mr. Rayson and I have, too. I'm going to tell you what I was told about it, if you want it that way.

* * * * * * *

Q. Did your man go to work that day or not?

A. What day?

Q. August the 16th.

A. Yes, they did. There wasn't any picket line or mob there when my men went to work.

Q. Now, you say that you talked to Tennessee Consolidated after this incident, in August of 1960, and asked them if they would give you any leases. Is that correct?

A. Yes, sir.

Q. I believe you previously testified that these con-

122 versations were some time in April of 1961, is that correct?

A. Our conversations to try to get the work from them was from the time this incident happened on up until I did get the lease from them.

Q. You got a lease? When?

A. I believe the lease is dated November the first of '61.

Q. And that mine has operated ever since then?

A. No, sir, we haven't worked. . .

Q. And your trucks have hauled the coal?

A. Yes, sir.

Q. Did you talk with Paul Kaluse and Mr. Beaumont about that?

A. Yes, sir.

Q. When was it that you asked George Ramsey if you could haul some coal or buy some coal from him?

A. The last time I tried to get any coal from Mr. Ramsey was in March of '61.

Q. I believe that you previously testified that that is the first time that you had tried to get coal from him after the incident of August, 1960?

A. I may have asked him about coal before that, but I actually went to his operation this particular time you're talking about.

Q. Let me ask you this, Mr. Gibbs. When you asked these other people for coal, Mr. Ramsey in particu-
123 lar, this was after your lease or after your contract to haul coal with The Pikeville Coal Company had been cancelled. Is that right?

A. No, sir, it wasn't.

Q. It was about the same time?

A. We was buying coal at that time and hauling it to Marquette Cement Plant for Tennessee Products Chemical Corporation.

Q. Yes, sir.

A. And due to the fact that I couldn't get the coal from Mr. Ramsey I drove 40 miles further on out the road and bought it from Studder Brothers and hauled it to Marquette Cement Plant for Tennessee Products and Chemical Company.

Q. The Marquette Cement Plant matter, so that the jury will understand, this was a company to which you were hauling coal on a Tennessee Products contract?

A. Yes, sir.

Q. And some time in the Fall of 1961, when your leases

were cancelled, is it not a fact that Tennessee Products, after having warned you to stop hauling some inferior coal to Marquette Cement Company, cancelled your contract because you had hauled coal to that company, which had a high ash content?

A. The only way I can answer that is that the coal which I had been hauling was satisfactory over there for better than six years. No complaint on it whatsoever . . .

* * * * * * *

124 Q. The question that I wanted to ask you is simply this. Did Tennessee Products tell you to stop hauling certain coal to this company in the Fall of 1961.

A. Yes, sir, they did.

Q. And did you continue to haul such coal to The Marquette Steam plant, after Tennessee Products told you not to do so?

A. Just for that week only, when they cancelled the contract.

Q. And was it after that that this letter of cancellation, or was this cancellation some time in the latter part of September of 1961 was made?

A. Well, during the negotiations of the cement plant contract Mr. Rayson, Mr. Human called for me to come to the office. Well, I went to the office and he requested me to take the coal from The Tennessee Products and Chemical Corporation Plant to Marquette Cement Plant and quit buying outside coal.

Q. Mr. Human was the head of Tennessee Products over there at that time?

125 A. Yes, sir.

Q. All right.

A. And I asked him where he could get the coal. I said what about giving me a new lease to open up. He said, "We can't do that. We haven't got any." He said,

"You'll have to get it from some of the other mines," and I mentioned different and various mines over there where I might get the coal, and he refused me with every one of them and cut me off. . . .

Q. This was all in September of 1961?

A. That was all about the Marquette Plant Cement Company.

Q. Was this not after you had had some conversation with him to the effect that you had been hauling coal with a high ash content to The Marquette Cement Plant?

A. I don't think we ever discussed that, nothing more than what coal I had hauled down there had been satisfactory all these years.

* * * * * * * *

Redirect Examination.

* * * * * * * *

126 Q. Now, Mr. Gibbs, there has been certain photographs introduced into evidence here, which shows the lay of the land there, referred to as the Pocket Road and the Gray's Creek Road. The picket was where?

A. The mob was right there at the road that goes into——

Q. Gray's Creek Road?

A. Gray's Creek Road.

Q. But to get to your mines, did you have to cross that picket line?

A. I had to go right by it. Yes, sir.

Q. By it, or across it?

A. I had to go right by it.

Q. But you didn't have to cross it?

A. No, sir.

Q. These men, going into your mines; was it necessary that they cross the picket lines, as Mr. Rayson has suggested, to get to your mines in the Pocket?

127 A. It was necessary that they drove this Pocket Road going into my mine. Yes, sir.

Q. To go by, but not cross it. Is that correct?

A. That's right.

Q. You have been operating those mines there, your mines, for quite sometime, I believe the testimony shows, had you not?

A. Since October of 1954.

Q. Mr. Rayson has asked you two or three questions, the implication of which, you had all this peace and quiet in your own mine, after the 15th. Was there, or did you have trouble then?

Mr. Rayson: What was the question, please?

Q. What difficulty did you have in operating those mines, your own mines, after the 15th? What happened then, if anything?

A. I had to hire a man to take my place, down there, to run the mine.

Q. What other difficulty did you have there?

A. On different occasions the men came back home, during the day. They didn't put in their full shifts.

* * * * * * *

Q. But, at any rate, you didn't go back down there, yourself, did you?

128 A. No, sir.

Q. Now, this Coal Valley Mine, that you give reference to. Which one of these locals, up here, had jurisdiction over that mine?

A. The Coal Valley?

Q. Yes.

A. The 5881 at Palmer.

Q. And was that the Mr. Walton Schrum?

A. He's President of the local. Was then, and is now.

Q. And still is?

A. Yes, sir.

Mr. Van Derveer: Other than those reserved questions, I believe that's all, Your Honor, please the Court.

The Court: All right.

Mr. Rayson: One question, Your Honor.

Q. Who is the man that you hired to run your mines?

A. Jake Scissom.

* * * * * * *

JOHN D. CAIN, JR.,

having first been duly sworn, testifies as follows:

Q. Will you state your name, please sir?

129 A. John D. Cain, Jr.

* * * * * * * *

Q. At this time, are you engaged in the labor movement in any way?

A. No, sir. None whatsoever.

* * * * * * *

Q. Who were you employed by on August the 15th and 16th, 1960?

A. I was International Field Representative for the Southern Labor Union.

Q. Where is the chief office, or the head office, of the Southern Labor Union?

A. Oneida, Tennessee.

130 Q. What area did you work in?

A. We were chartered internationally, but the extent of my work wasn't more than the eastern and western Tennessee and Kentucky areas, although I had made various trips into West Virginia, Virginia, and Alabama.

Q. Now, in performing your duties, as you have outlined for us, were you called upon to come into, or were you sent to the Palmer, Tracy City, or Whitwell area?

A. Yes, sir.

* * * * * * *

141 Q. Now, Mr. Cain, tell us what happened over in the area of the Pocket Road and the Gray's Creek Road, on the morning of—was it the 15th or 16th that you were there?

A. I was there on the two mornings.

Q. Make it complete, but as short, and concise as possible, and just tell, in your own words, what happened there on the 15th?

Mr. Kramer: Please the Court, we're going to object to that, because unless the International Union was responsible, and Your Honor has heard part of his testimony, and there's no showing of any competence there, and we object to it.

The Court: The testimony will be admitted, subject to its being made competent, until or unless, ladies and gentlemen, there should be testimony that would cause you to find that the International Union was responsible for what occurred on the mornings of August 15th and 16th. Of course, this testimony, as to what did occur, would not be considered by you. What that instruction, you may proceed with the examination.

142 A. I made my first trip into the Pocket area, which was on a Monday morning, I think the 15th day of August, 1960. I was going in there to sign up some employees, who had been hired by The Grundy Mining Company. I was encountered by a wide picket across the road. I stopped and asked the gentlemen if they were members of the Grundy Mining Company.

Q. Let's leave the labor union activities out of it. Were you permitted to go in there?

A. No, sir. I was not.

Q. How many were in the group?

A. There were some four to eight men. I don't remember exactly.

Q. State whether or not they were armed?

A. They were armed. Yes, sir.

Q. Was that on the 15th?

A. It was on Monday morning. I'm not sure——

Q. How long did you stay in that immediate area, at that time?

A. Oh, just some three minutes. I turned around and left the area.

Q. When was it that you again came into that area?

A. On the next the morning. The following morning.

Q. Which was the 16th?

A. Yes, sir.

Q. Approximately, what time did you arrive, there?

143 A. Approximately 6:30 A. M.

Q. Briefly, in your own words, tell us what you found when you arrived?

A. There was a group of men there, and I asked them if they were employees of the Grundy Mining Company. They said no and that they were members of The United Mine Workers, and they said we've been looking for you.

Q. We don't want you to testify what someone said. Just testify what actually happened. Let me ask you the questions this way, and perhaps we can move along a little more swiftly. When you arrived there, approximately how many men were there?

A. Some 12 or 15.

Q. How long did you stay there?

A. Until about 10:30 in the morning.

Q. At the time that you left, how many men were there?

A. Some sixty to seventy men.

Q. State whether or not any of those men were armed.

A. Yes, sir. They were.

Q. Few or many?

A. Many.

Q. What were they armed with, that you actually saw?

A. Shotguns, rifles and pistols.

Q. State whether or not any vile or filthy language was used toward you?

A. Quite a bit. Yes, sir.

144 Q. Where did you go when you left there?

A. I went to Murfreesboro, Tennessee.

Q. When you are talking about when you arrived there, you're talking about the entrance to the coal mines, that is the Coal Valley Mines. Is that right?

A. Yes, sir.

Q. What happened to you while you were there?

A. I was severely beaten.

* * * * * * * *

Q. Was that in Mr. Gibbs presence?

A. Yes, sir. It was.

Q. Can you identify, by names, the men that assaulted you?

A. There was a gentlemen by the name of Brewer.

Q. Yes, sir.

A. Mr. Hart and a Mr. Banks. Those three I recall. There were some who hit me behind my back, who I didn't see who they were.

Q. Did they work you over pretty good?

A. Quite a bit. Yes, sir.

* * * * * * * *

145 Q. What, if anything, happened to your brief case, and any other papers or valuables that you had there?

A. Everything that was in my automobile was taken out and set afire, and burned.

Q. In your presence?

A. In my presence. Yes, sir.

* * * * * * * *

Q. How long was it that you stayed in this particular area, there?

A. I got away from there somewhere around 10 or 10:30 in the morning. I didn't know exactly what time.

Q. What were the circumstances under which you left?

A. I was ordered to Ramsey's mine to pick up a Charter.

Q. Just a minute, now. Leave Mr. Ramsey out of it—that part of it—and I don't want you to testify what any of the men said to you; just what happened. When you left, did you leave in your car?

A. Yes, sir. I was in my car.

Q. Were there any cars ahead of you?

146 A. No, sir, but they were behind me.

Q. How many were behind?

A. Some 15 or 20 cars.

Q. Were the men armed at that time?

A. Armed? Yes, sir.

Q. Which way did you go or head, when you left the area?

A. I went back through Palmer, into Highway, I think Highway 56.

Q. Was that procession the same way, through Palmer?

A. Yes, sir. It was.

Q. After you left Palmer, were you able to get away from——

A. Just on the outskirts of Palmer I violated the speed law, but I got away from them.

Q. Where did you go?

A. I went to Murfreesboro, Tennessee.

Q. Did you go into a hospital, there?

A. Yes, sir.

Q. From that day until this, have you been back in that field?

A. No, sir.

* * * * * * *

167 **PAUL GIBBS**

is recalled for further examination.

Direct Examination,

By Mr. Van Derveer:

Q. Mr. Gibbs, when you were on the stand yesterday you testified to certain facts pertaining to what it cost you, or would have cost you, to have completed your hauling contract with the Grundy Mining Company. Now, in the record you kept there, or in the books that you kept, what reference, if any, do you have as to your expenditures?

A. All I have is those ledgers there.

Q. You call these ledgers, and I hand to you certain books. Would you describe to the jury just exactly what these are?

A. For one year?

168 Q. Let me put it this way. Do you have a different book, or ledger, as you call it, for each of the years, 1958——

A. I have a book for each individual year, yes.

Q. And those are for what years?

A. '58, '59, '60 and '61.

Q. I'll ask you if you will hand those to the reporter and ask the reporter to properly mark as exhibits.

Reporter: No. 23, '58. '59, No. 24. '60, No. 25. '61, No. 26.

(Plaintiff's Exhibits No. 23 through No. 26 tendered and received in evidence.)

Q. Do you have any other records as to—from your business activities during those respective years, of the expenditures made by you?

A. Cancelled checks.

Q. But the ledgers are complete in all respects, as far as you know, is that correct?

A. Yes.

Q. Now, what records, if any, do you have of the income received by you for each of the same years?

A. Income tax returns.

Q. Now, you have a gross figure on each of the returns that were introduced into evidence yesterday for the same years. Where was the gross figure obtained for your total income?

169 A. Coalmont Savings Bank, at Coalmont.

Q. By whom?

A. My accountant, Mr. C. H. Kilby.

Q. And he is a witness here in this case?

A. That's correct.

Q. Then, the records that you have are related to your total income and your total expenditures, is that right?

A. That's right.

Q. Now, you testified yesterday as to what it would have cost you to have operated your trucks, help, labor, etc., for—or to complete the haulage agreement for the mine? Now, I hand you a certain schedule that has been prepared for the period of time September 1, 1960, through December 31, 1960, and see if you recognize that?

A. Yes, sir.

Q. And are the figures that are used there in those computations the figures that you testified to yesterday in this court and before this jury?

A. That's right.

Q. And that, I believe, also takes into consideration any adjustment on the income tax for what you did in fact make?

A. Yes, sir.

Q. And shows your loss——

Mr. Rayson: We object to leading, your Honor.

Q. What was your loss for those four months in 1960?

170 Mr. Rayson: Now, your Honor, we're going to object to this because there is no showing at this time the loss pertains to any of the issues in the case. You will recall that the witness testified that he was engaged in mining elsewhere, he continued to mine elsewhere, that he was engaged in hauling coal, and that he continued to do that up until that contract was cancelled by Tennessee Products sometime in 1961. So, evidently, the four-month period about which he is prepared to testify relates to a period that he was working for people not involved in this case.

Mr. Van Derveer: May it please the Court, we have Mr. Gilbert here, and we also have a CPA. Of course we can only use one of these witnesses at a time. This schedule takes that fact into consideration. A deduction is made for that, in other words, on that schedule.

The Court: May I see the schedule? Mr. Van Derveer, this exhibit—your question, as I understood, was as to what loss he sustained?

Mr. Van Derveer: Estimated loss.

The Court: Well, see if you can make your question more specific as to the matters in issue in this lawsuit; the loss of hauling contract, the loss of employment.

Q. Mr. Gibbs, does this computation take in your $600 a month, or is that the hauling contract?

A. That's the hauling contract.

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189 **WILLIAM CLYDE McCLAIN,**

having first been duly sworn, testifies as follows:

Direct Examination,

By Mr. Van Derveer:

Q. Will you state your name, please, sir?

A. William Clyde McClain.

Q. By whom are you employed?

A. Power Equipment Company, of Chattanooga.

* * * * * * * *

Q. Now, do you have with you the records of your company which show both your whereabouts and the whereabouts of Mr. Swope on the—in the neighborhood of the 15th or 16th of August, 1960?

190 A. I do. It does not say my name, but I was with him on several occasions, one in particular, August 22nd, 1960.

Q. Just a moment, now. Who is Mr. Swope?

A. Sam Swope was the salesman for our company for many years, he had a territory that included Marion County, Grundy Sequatchie County. Since a year or so ago, I guess, he has gone into business for himself.

* * * * * * * *

Q. State what those records show as to both your whereabouts and the whereabouts of Mr. Swope on or about that date?

A. Well, I can give you 15th, 16th, 17th, 18th, and 22nd, if you like?

* * * * * * * *

Q. Were you personally with Mr. Swope on these dates?

A. On the 22nd I was with Mr. Swope.

* * * * * * * *

191 Q. But you know that it is correct, of your own knowledge. Now, using that to refresh your memory only, to meet this objection, where were you and Mr. Swope on the 22nd of August?

A. We were in Grundy County, the coal mine at Monteagle, I don't know the exact county there, but we were in Whitwell, Monteagle, that area, Palmer.

Q. Are you familiar with the junction of a road over there known as state highway 108 and the Cove Valley Road?

A. I'm not exactly familiar with it, as far as locale or map locale is concerned, but I'm sure I've been on it.

Q. You know where it is?

A. I might could find it if I were driving.

Q. Were you along there on the 22nd?

A. Yes, sir, I was.

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193 **SAMUEL M. SWOPE,**

having first been duly sworn, testifies as follows:

Direct Examination,

By Mr. Van Derveer:

Q. Will you state your name please, sir?

A. Samuel M. Swope.

Q. Who do you work for, Mr. Swope?

A. I am presently self-employed, Swope Supply Company.

* * * * * * *

Q. On or about the 22nd of August, 1960, were you with Mr. McClain?

A. Yes, sir.

Q. Where were you?

A. In Grundy and Marion Counties.

Q. What were you doing over there?

A. Soliciting trade for Power Equipment Company.

Q. Did you pass a certain area there where a road turns off from highway 108 and goes down into Cove Valley mine?

A. Yes, sir.

194 Q. Did you also pass an area where the Gray's Creek road turns off what is called the Pocket road?

A. We didn't go down that far.

Q. But you did go by the other area?

A. Yes, sir.

Q. What was the condition there as it relates to whether any men were there and what they had with them, and so forth?

A. We were about 50 yards off 108, the main highway.

Q. Yes, sir.

A. On the left-hand side of the road there was this shelter, a tent, I believe, and there was a group of men around this tent and around the area, on the left-hand side of the road. That is the physical lay-out.

Q. What firearms, if any, did you see?

A. One rifle.

Q. Do you know who had the rifle?

A. It was laying against a log by the side of the road.

Q. Now, when you saw this what did you do?

A. I approached one of the men, without identifying myself, and asked if the mine was working——

Mr. Kramer: Now, if your Honor please, we object to any conversation between this man and an unidentified person.

Q. Let's see if we can identify the person. Who was the person?

195 A. I don't know.

Q. You do not know. What other people were there that you saw that you knew?

A. Well, I was there two or three minutes and I asked for George Gilbert.

* * * * * * *

Q. Now, did you talk to Mr. Gilbert?

A. Yes, sir.

Q. Now, what was the conversation that you held there at that time with Mr. George Gilbert? First, where did Mr. Gilbert come from?

A. Off the left of the road out of the wooded area.

Q. Out of a wooded area? Out of the woods, you mean?

A. Yes.

Q. All right. Now, what was the conversation that you held there at that time with Mr. Gilbert?

A. I asked him if we could get to the strip operations of Whitwell Coal Company.

Q. All right, sir.

196 A. And he said that we couldn't get through that road but we could go down through the Pocket and turn to the right at a coal tipple and that there would be some of his men there, for us to tell them that he said it was all right to go through.

Q. Now, is that the whole conversation as you now recall?

A. Yes, sir.

Q. Did you follow his instructions?

A. No, sir, we started down and then we decided that was no place for us so we didn't go on down to where the road turns off.

* * * * * * *

197 **Redirect Examination,**

By Mr. Van Derveer:

Q. Do you know the car that Mr. Gilbert was driving?

A. Yes, I'd seen his car several times, and if I'm not mistaken it was a black Pontiac.

Q. Was Mr. Gilbert's car right there?

A. Parked right there where I could tell it was his car, that is the reason I asked for him.

Mr. Van Derveer: That's all.

Recross-Examination,

By Mr. Kramer:

Q. Did you know Mr. Gilbert before this?

A. Yes, sir.

Mr. Kramer: That's all.

Redirect Examination,

By Mr. Van Derveer:

Q. How long had you known him, Mr. Swope?

A. Oh. I'd say possibly eight to ten years. I can't recall, I've known him for——

Q. Wouldn't be any mistake about it being him?

A. No, sir.

Mr. Van Derveer: That's all.

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198 **CLYDE MEEKS,**

having first been duly sworn, testifies as follows:

Direct Examination,

By Mr. Van Derveer:

Q. What is your name?

A. Clyde Meeks.

Q. How do you make a living?

A. Well, I catch chickens right now.

Q. Have you ever been engaged in the coal mining business?

A. Yes, sir.

Q. For how many years?

A. Well, I guess I worked about 20 years.

Q. What you mean is that you are unemployed at the present?

A. Yes.

Q. How long has it been since you have worked over there?

A. Well, it has been a little over two years.

Q. A little over two years, but 20 years before that you worked there as a miner?

A. Yes, sir.

Q. Have you spent those 20 years in the fields over in and around Palmer, Whitwell, and Tracy City?

A. Yes, sir.

199 Q. The only fields that you worked in?

A. Yes, sir.

Q. Have you ever been a member of the United Mine Workers Union of America?

A. I was a member ever since I started up until a little better than two years ago.

Q. Were you, during those 20-odd years, so far as you know, a member in good standing, and always paid your dues?

A. Yes, sir. Maybe I was out of a job and quit for a month or so, and get out of the union, but I'd go back in the union again.

Q. Now, Mr. Meeks, were you over in that area known as the junction of the Pocket Road and Gray's Creek Road on either the 15th or the 16th of August, 1960?

A. Well, I was in Gray's Creek on the 15th.

Q. Let's talk about the 15th first, and we want to make this completely, but as short and concise as we can. Just tell the Court and jury in your own words what happened over there the 15th of August, 1960?

A. To tell the words that they said there?

Q. Well, I don't want you to use any vile or filthy lan-

guage, and you cannot testify what someone told you, now. But, just testify what you actually saw and what happened to you, if anything.

A. Well, they was five or six of us went down there
200 in a pick-up truck, and they was two men come down there. One of them was Maybry, and I didn't know the other man who was there. He told us——

Q. Don't testify, now, to what any of those men told you, just what happened. You told us that four or five of you were in a pick-up truck and you went down to the junction of Gray's Creek Road and Pocket Road, is that right?

A. No, sir, we was in Gray's Creek.

Q. Now, how long did you stay down there at the mine site?

A. Well, I imagine we stayed maybe an hour, an hour and a half, I don't know just how long.

Q. Then you left?

A. Then we left.

Q. Why did you leave?

A. Well, they was two or three men there, so they said . . .

Q. Not what they said. Were you able to work that day?

A. Yes, sir.

Q. The 15th?

A. Yes, sir.

Q. But you stayed there about how long?

A. About an hour, hour and a half.

Q. Then where did you go?

A. Went back home.

201 Q. Back home. Now, did you return there on the 16th?

A. We returned but we was on top of the mountain that time, what they call Dogwood Flats.

Q. And when you got into the Dogwood Flat area there, what did you see?

A. Well, there was a pick-up truck sitting there.

Q. Now, when you say "sitting there", you mean sitting at the junction of the Gray's Creek Road and the Pocket Road?

A. Yes, sir.

Q. Now, Mr. Meeks, was that Gray's Creek Road the only way to get down to that mine site?

A. No, sir, the next morning we come in from "Bearfield", what they call "Bearfield". There is a road that way.

Q. That is one of the back roads around through the mountain.

A. I think maybe there is one goes in through Pocket, I don't know sure.

Q. All right. When you arrived at the junction of the Gray's Creek and Pocket, what did you find?

A. Well, there was one man there with his truck, and we asked him if——

Mr. Kramer: Now, your Honor, we object to that.

Q. How long did you stay right there at that area?

A. Well, I stayed not over 30 minutes.

Q. Did anymore men come while you were there?

202 A. Yes, sir.

Q. Now, at the time that you left, you told us after about 30 minutes, how many men were there?

A. I guess there was around 75, somewhere around through that neighborhood, I don't know just exactly how many.

Q. Did you see any fire arms?

A. Yes, sir.

Q. Did you see few or many guns?

A. Well, I saw several guns, I wouldn't say how many, but there were several guns.

Q. Now, what type or kind of guns were they?

A. Well, I don't know about that, I just know they were guns. I don't know whether they were .16 guage or .12 guage, or what they were.

Q. You knew they were shotguns?

A. Knew they were shotguns.

Q. Now, in this truck that you were in, you told us it was a pick-up truck——

A. That was on the 15th, we was in a car on the 16th.

Q. On the 16th. Now, whose car was this that you were in?

A. My own.

Q. Whose?

A. My own car.

Q. All right. And, what other men were in this car
203 with you?

A. Well, I can't hardly recall just for sure what men was in the car, you know. There were three different cars up there that morning.

Q. Now, had you gone over there to try to go to work that morning?

A. Yes, sir.

Q. Were you able to work that day?

A. Yes, sir.

Q. The 16th?

A. Yes, sir.

Q. Down at the Gray's Creek mine?

A. I was able to work, yes, sir.

Q. You went on in there on the 16th?

A. No, sir, I didn't get in there.

Q. That's what I say. You did not go down to the mine on the 16th?

A. No, sir, we didn't get in.

Q. All right. Now, where did you go?

A. We just went to the Dogwood Flat road, that turns off.

Q. Why didn't you go on down in?

A. Well, we looked for Paul Gibbs that morning to find out whether he wanted us to go in and work. So, we just asked that fellow if he had saw Paul Gibbs.

Q. And when you ran into this mob, where did you go?

204 A. Well, we had to go home.

Q. Were any shots fired there that day?

A. Yes, sir, there was one shot fired.

Q. Fired at who?

A. Well, I don't know who they fired it at but they hit Ott Standifer's car.

Q. Now, you've told us that you had your car, and now you've brought in another name. Is that one of the other cars?

A. That is one of the other cars, yes, sir.

Q. Now, who is this Ott Standifer?

A. Ott Standifer, is all I can say.

Q. Was he supposed to work there too?

A. Yes, sir.

Q. Now, do you know who it was who actually shot at Mr. Standifer?

A. No, sir, we had pulled out on the road just a little ways when the shot fired.

Q. What did you do when you got shot at?

A. Well, we was done leaving out, you know. I was the first car parked out there, and I was the first car leaving out, and I just pulled out on the road when we heared the shot, we run out there and stopped.

Q. The car was hit?

A. Yes, he hit the car.

Q. So what you did, you just got away from there?

205 A. I just got away.

Q. About as fast as you could?

A. Well, I could have got away faster.

Q. Now, I'm talking about the entrance to the Gray's Creek mine, where the Gray's Creek Road turns off Pocket Road. After that, after the 16th of August, how long was it that a picket line stayed up there?

A. Well, I couldn't say, it stayed there for a good while.

Q. When you say a "good while", do you mean days, weeks, or months?

A. It stayed there for weeks. I don't know just how long.

Q. Did you pass there and see that line?

A. No, sir, I didn't go back in.

Q. You stayed out of there?

A. I stayed at home.

Q. Mr. Meeks, who is this fellow George Gilbert?

A. Well, the representative, I reckon, of the United Mine Workers.

Q. You've seen him over there?

A. I didn't see him that morning, no, sir.

Q. But, have you seen him over in and around the mines?

A. Yes, I've seen him at times, but not that morning.

Q. Not that particular morning. Have you seen him over in and around the mine fields on many occasions?

206 A. Yes, sir, several occasions.

Q. You've told us that you were a member, so far as you know, in good standing, of the United Mine Workers for 20-odd years, is that right?

A. Twenty-some odd years.

Q. During that period——

A. Ever since the union has been.

Q. During that whole period of time has this District # 19, up in Middlesboro, Kentucky, kept some man down here representing them?

A. Yes, sir, most of the time.

Q. And, those men were who?

A. Well, I just couldn't recall all their names. Hugh Rankins, I believe, was one of them.

Q. Was Mr. Gilbert one of them?

A. Nat Bunch, I believe, was one of them.

Q. That's right.

A. And then this Gilbert.

Q. Is Mr. Gilbert still in there?

A. As far as I know, he is.

Q. Now, Mr. Meeks, some reference has been made here to what has been called a "mine committee". What is a mine committee?

A. Well, you're supposed to have three committees, if there is any trouble come up, you're supposed to
207 go to the committee and let them do the settling of it.

Q. Have you ever belonged to this 58-81 over there?

A. Yes, sir.

Q. That was your local, wasn't it?

A. Yes, sir.

Q. And, let's see, who is president of that local now?

A. Bryan Harman, when I was there.

Q. And who else?

A. I wouldn't say, but it seemed Sweenan was president there once.

Q. That 5881, is that the local according to the United Mine Workers way of thinking that had jurisdiction over that area, or whatever you call it?

A. Yes, sir.

Mr. Van Derveer: I believe that's all. Just one other

question. Have you been able to work over there since this incident?

A. No, sir.

* * * * * * * *

208 **Cross-Examination,**

By Mr. Rayson:

Q. The men you saw over there on that morning of the 16th were coal miners that worked at the Coal Valley mine, weren't they?

A. Well, yes, sir, I reckon most of them.

Q. There are a great number of coal mines over in the Pocket area, aren't there?

A. Yes, sir.

Q. And, when you say you saw George Gilbert, he may have been about any of those mines, attending to his business, isn't that right? Isn't that what you are telling us?

A. I don't believe I got you there.

Q. I say, you would see George Gilbert over among the coal miners in the fields for a great number of years?

A. Yes, sir. Not too many years . . .

Q. Well, several years?

A. Yes, sir.

Q. When did you last work at the Coal Valley mine?

A. Well, I guess it was about the top of '59.

Q. '59.

A. Somewhere around there.

Witness excused.

209 **ARDEN CLINT FORSYTH,**

having first been duly sworn, testifies as follows:

Direct Examination,

By Mr. Van Derveer:

Q. What is your name, please, sir?

A. Arden Clint Forsyth.

Q. How old are you?

A. 21.

* * * * * * * *

Q. How do you make a living?

A. Timber.

* * * * * * * *

Q. Have you ever done any mining?

A. No, sir.

* * * * * * * *

210 Q. Now, Mr. Forsyth, do you know where over in the coal mining area there, the road is that is known as the Pocket Road?

A. Yes, sir.

Q. Do you know where it turns off from highway No. 108?

A. Yes, sir.

Q. Now, do you know where the Gray's Creek Road turns off of the Pocket Road?

A. Yes, sir.

Q. You have been there, haven't you?

A. Yes, sir.

Q. Now, were you there, along with some other people, on either the 15th or 16th of August, in 1960?

A. I was there both days.

Q. Both days?

A. Yes, sir.

Q. Now, let's talk first about the first day you were there, which was the 15th. What were you doing there?

211 A. They told us to go down there, they was supposed to meet us down there.

Q. Supposed to meet you down there?

A. Yes, sir.

Q. Were you going down there to go to work?

A. Yes, sir.

Testimony of Arden Clint Forsyth

Q. Now, who were you scheduled, or who were you supposed to meet down there?

A. I never did know.

Q. You didn't know. Did you go on down Gray's Creek Road on the 15th?

A. Yes, sir.

Q. Down to the actual mine site?

A. That's what they said it was supposed to be.

Q. Had the area been 'dozed off there?

A. I don't remember now.

Q. Don't remember. Who was with you down there at the mine site on the 15th? Monday, the 15th.

A. Clyde Meeks . . .

* * * * * * * *

Q. Who else?

A. Jessie Forsyth.

Q. What others can you think of?

212 A. That's about all.

Q. All right. Without regard to who they were, how many were there?

A. 18 or 19.

Q. 18 or 19, and how long did this—the people you were with, stay down there at the mine site on the 15th, the morning of the 15th?

A. Hour and a half or two hours.

Q. Where did you go then?

A. Back home.

Q. In other words, you did no actual mining on the 15th?

A. No.

Q. Didn't try to open up the mines?

A. No, sir.

Q. All right. Now, did you go back over there the morning of the 16th?

A. Yes, sir.

Q. Who did you go with?

A. The same ones.

Q. The same ones. And, when you got into this Dogwood Flats area, you know where that is, don't you?

A. Yes, sir.

Q. Just tell the Court and jury what you saw there at that time?

213 A. When we first got there, there was one man there I didn't know.

Q. You want to raise your voice, now.

A. There was one man there, I didn't know who he was.

Q. All right, sir. How long did you stay there?

A. I've forgot now.

Q. Well, about how long, the best you can estimate it?

A. About 30 minutes.

Q. And at the time you left, how many men were there?

A. With me?

Q. No, not with you, in the whole group?

A. There was 30 or 40, I guess.

Q. Your best estimate, now. Did you see any guns?

A. Yep.

Q. Did you see few or many guns?

A. Few.

Q. Well, what kind of guns?

A. I don't know what kind they was.

Q. Shot guns, rifle, or what?

A. I don't know.

Q. You don't know that. Now, were you able, the group that you were with there, were you all able to get off the Pocket Road and go on down into the mines on the 16th?

A. No. They wouldn't let us.

214 Q. They wouldn't let you. All right. What did you do there, after you stayed there, as you told us, this 30 minutes?

A. They told us to get out of there and we left.

Q. Did you hear any shots fired?

A. Yes, sir.

Q. Who was shot at?

A. I don't know whose car it was, they shot the back fender of a car.

Q. As the car was leaving?

A. Yes.

Q. Now, how many cars were there that had the folks that were supposed to go down and work in them? Was there one, two, three, or half a dozen?

A. Four or five of them.

Q. All right. And it was one of those cars that was shot?

A. Yes, sir.

Q. Is that the only shot that you heard fired?

A. I believe it was two fired.

Q. You were getting out of there, were you?

A. Yes, sir.

Q. Now, after that, did you have any reason at all to go back over to that same area?

A. No, sir.

Q. Why didn't you go back over there?

215 A. Well . . .

Q. That's all right, you need not answer that. Do you know of your own knowledge, now, whether after these shots and all this stuff that happened on the 16th, any of you men were allowed to go on down the Pocket Road, not Gray's Creek Road, the Pocket Road?

A. I don't know.

Q. Did you try to go down?

A. No.

Q. Have you ever been back in that area at all?

A. No, sir.

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Cross-Examination,

By Mr. Rayson:

Q. You went there to the Dogwood Flats on the 15th, I believe Mr. Forsyth, the 15th and 16th, is that right?

A. Yes, sir.

Q. And, is your home north of this country?

A. Yeah, I imagine.

Q. Well, how far is it from Dogwood Flats?

A. 20 miles.

Q. And, you say you have never worked in the mines?

216 A. No.

Q. When did you get hired for this job?

A. I don't know exactly when it was.

Q. It was the day before, wasn't it? Didn't Dempsy Campbell come to you the day before, on a Sunday, and ask you to go?

A. I believe it was on a Sunday.

Q. The day before?

A. Yes, sir.

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WILLIE CARL FULTS,

having first been duly sworn, testifies as follows:

Direct Examination,

By Mr. Van Derveer:

Q. Will you tell us your name?

A. Willie Carl Fults.

Q. Where do you live?

A. Coalmont, Tennessee.

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217 Q. How old are you, Mr. Fults?

A. I'm 43.

Q. How do you make a living?

A. I work in a strip pit.

Q. In a strip pit, a strip mine?

A. Yes, sir.

Q. How long have you been digging coal?

A. Well, I've been associated with the coal business since, I guess, about 1940.

Q. Have you ever been a member of the United Mine Workers of America Union?

A. Yes, sir.

Q. For how many years?

A. I couldn't tell you exactly, I'd say in the neighborhood of 10 years.

Q. During that period of time, so far as you know, did you pay your dues and were you a member in good standing?

A. Well, my dues were always checked off of me.

Q. What local did you belong to?

A. At one time I belonged to the Coalmont local, not too long, and I belonged to the Pocket local and the Weber local.

Q. Now, when you say the Pocket local, which local is that?

218 A. That's 7083, I believe.

Q. It's the one in Palmer?

A. In Palmer? No, sir, it's the one over the Pocket.

Q. In the Pocket, that's right. Now, were you with a group of men in the area of the Dogwood Flats area the morning of August the 15th, 1960?

A. I don't know the date but I was there on Monday morning, on a Monday morning, but the date, I wouldn't be positive.

Q. Now, briefly, what happened the morning of the 15th? Not the 16th, the 15th.

A. Well, I went over there to work, and I rode over with Dempsey Campbell, I didn't have no way of going that morning, and I went with Dempsey Campbell and George Kane or Keen or something, I'm not sure about his name.

Q. All right, sir. And when you got to . . . had you ever been in there before?

A. No, sir.

Q. I'm talking about the Gray's Creek area?

A. I'd been through there, but down where the mine was at, I had never.

Q. Had you been along the Pocket Road?

A. Yes, sir.

Q. But had not been on Gray's Creek Road?

A. Yes, sir.

219 Q. I believe Gray's Creek Road was a brand-new bulldozed road, wasn't it?

A. It hadn't been there too long.

Q. Did you all actually go down Gray's Creek Road to the mine site, the morning of the 15th?

A. Yes, sir.

Q. Did you see the area that had been 'dozed off there?

A. Well, there was a big strip around through there with a shovel, and it was my understanding they were going to start making those mines.

Q. That is the way you open a mine, isn't it?

A. Yes, sir.

Q. The accepted way to open a mine, I mean?

A. Yes, sir.

Q. Now, how many men were with you there, ready to go to work the morning of the 15th?

A. Two, Dempsey Campbell and I, that morning.

Q. How long did you stay there?

A. Oh, we didn't stay no more than 10 minutes, I don't guess.

Q. Were you scheduled to meet anyone there?

A. Yes, sir, Paul Gibbs was going to show us where to start or something.

Q. Did Mr. Gibbs meet you?

A. No, sir, he got on a different road. There are
220 two roads going in there.

Q. Now, when you didn't meet Mr. Gibbs, where did you and Mr. Campbell go?

A. Well, we would stayed down there, but there was three men there, Mr. Cain then talked to them a minute or two, a few minutes, and then he came back and got in the car, and we come back down the road and met Mr. Gibbs and some other men out there.

Q. You all thought it was the best thing for your health to leave, or what?

A. Well, according to what Mr. Cain said, we did.

Q. Well, anyway, you do not want to testify what someone told you. Anyway, you left that morning?

A. Yes.

Q. And went home?

A. Yes, sir.

Q. Did you go back over there the next morning, which would be Tuesday morning, the 16th?

A. When Mr. Gibbs gave me this job, one of my friends had asked me to build a truck bed for him. And, he had to get some lumber and things ready, and I had told him if he would get the lumber ready, I'd build it for him, and he said, I can't have it ready by Monday, but I'll have it ready by Tuesday, and so then, after that, Mr. Gibbs got me this job, and I told him. I said . . .

221 Q. Let's get into now what happened on the morning of the 16th?

A. Well, I didn't go. I had to build this truck bed for this man.

Q. You were not over there at all on the 16th?

A. No, I couldn't go. I was already obligated to this man to build his truck bed on Tuesday and Wednesday. I couldn't go.

Q. And that is the reason that you were not there on the morning of the 16th?

A. Yes.

Q. Then what happened over there that particular morning? You have no knowledge of your own?

A. No, sir.

Mr. Van Derveer: You may ask him.

Cross-Examination,

By Mr. Kramer:

Q. When did you have a conversation with Mr. Gibbs about going over there to work?

A. I believe it was on Sunday morning.

Q. The day before you first went over there?

A. Yes, sir. Mr. Campbell came up to the house . . .

Q. I don't care for any conversation, but, Mr. Gibbs, you say, talked to you?

A. On Sunday morning.

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222 **ALFRED DAVID ANDERSON,**

having first been duly sworn, testified as follows:

Direct Examination,

By Mr. Van Derveer:

Q. Will you state your name, please, sir?

A. Alfred David Anderson.

* * * * * * *

223 Q. Have you ever been engaged in the coal mining business?

A. Yes, sir.

Q. For how many years?

A. Well, about—I worked off and on for about three years for myself.

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Q. Mr. Anderson, were you with several men that went to an area known as the Dogwood Flats on Monday morning, the 15th of August, 1960?

A. Yes, sir.

Q. Who were you with?

A. I was with Mr. Gibbs . . .

Q. Who did you go over there with? Now, this is Monday, the 15th.

A. I drove Dempsey Campbell's pickup and I took a bunch of men.

Q. All right, sir. Now, do you know where the junction or where Gray's Creek Road turns off there from the Pocket Road?

224 A. Yes, sir.

Q. Do you know where that is?

A. Yes, sir.

Q. All right. Now, when you got to that area right there the morning of the 15th, what, if anything, did you see?

A. Well, let me explain one thing to you, if I may.

Q. All right, sir.

A. I don't have any education and when you say the 15th is that Monday morning or Tuesday?

Q. The 15th was on Monday morning.

A. All right. Well, on Monday morning we took a short route going into Gray's Creek.

Q. All right. Did you go into the mine site?

A. No, sir, I did not.

Q. Where did you go?

A. I got lost and we all met on the side of the road so we could find where it was at.

Q. After you had this meeting did you go back down to the mine site area?

A. No, sir.

Q. You went on home that day?

A. Yes, sir.

Q. All right. Now, did you go back the next day, the 16th?

A. Yes, sir.

225 Q. And on the 16th did you go to this junction there, knowing where to go then?

A. Yes, sir.

Q. Did you go to where Gray's Creek Road turned off?

A. Yes, sir.

Q. Now, what did you see when you got there?

A. There was a pickup truck parked kind of back, you know, out in the road a little bit.

Q. Kind of blocking the road?

A. Just back into the road a little bit, kind of crossways otherwise.

Q. All right, go right ahead?

A. There was a coal truck there that was hauling coal out from Gray's Creek.

Q. All right, sir.

A. This guy was talking to him and that guy pulled out and went on toward the mines.

Q. How long did you stay there?

A. About 15 or 20 minutes.

Q. Is that as long as you stayed?

A. Yes, sir.

Q. How many men were in that whole area there at the time that you left?

A. I couldn't rightly say.

Q. Well, I know you couldn't rightly say, but make
225 a good guess, the best you know? Was it 10 or 100?

A. I'd say there was at least 40 men there.

Q. Did you see any shotguns or rifles?

A. Yes, sir.

Q. A few of them or a whole lot of them?

A. Just about every man.

Q. Did you—were any shots fired?

A. There was one shot.

Q. Who was shot at?

A. They shot into the back of a man's car.

Q. The back of what car?

A. Arthur Sanders.

Q. Was that—where was Mr. Sanders' car when the shot was fired?

A. It was parked right behind, I believe, Mr. Meeks' car.

Q. Was Mr. Sanders in it?

A. Yes, sir.

Q. Was it full of men when it was shot into?

A. Yes, sir.

Q. What did Mr. Sanders do?

A. Well, he left there.

Q. All of you left?

A. Yes, sir.

Q. Have you been back to that area since?

227 A. Hauled coal through there is about all.

Q. Hauled coal through there, you mean on the Pocket Road?

A. Yes, sir.

Q. Now, do you know whether Mr. Gibbs had some other mines on down the Pocket Road?

A. He had one.

Q. Do you know whether any of Mr. Gibbs' employees or Mr. Gibbs was blocked or prohibited from going into those mines on the Pocket Road, not the Gray's Creek?

A. No, sir, I do not.

Q. You say now that you have hauled coal by there?

A. Yes, sir.

Q. Was a picket line up there for some time blocking Gray's Creek Road?

A. No, sir.

Q. You don't know about that?

A. No, sir.

Mr. Kramer: He said, "No, sir." . . .

Mr. Van Derveer: Whatever he said the jury heard it and the Court did, too.

Q. Who were you hauling coal for then?

A. Mr. Sam Nunnley.

Q. Mr. Nunnley?

A. Yes, sir.

228 Q. Are you working over there today for him?

A. No, sir, I just hauled, I've got my own truck and I do my own hauling.

Q. Looking for hauling?

A. Yes, sir.

Mr. Van Derveer: I believe you can ask him.

Cross-Examination,

By Mr. Kramer:

Q. Mr. Anderson, when were you employed to go over there to go to work? The day before, Sunday?

A. No, sir, I believe it was on Saturday.

Q. On Saturday?

A. I believe it was.

Q. And Monday was the first day you went over?

A. Yes, sir.

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229 **DEMPSEY CAMPBELL,**

having first been duly sworn, testifies as follows:

Direct Examination,

By Mr. Van Derveer:

Q. Will you state your name, please, sir?

A. Dempsey Campbell.

Q. Where do you live, Mr. Campbell?

A. I live in Shelbyville, Tennessee.

Q. How do you make your living?

A. Farming.

Q. Have you ever been engaged in the coal mining business?

A. Yes, sir.

Q. Ever work over in the Whitwell fields, over in the Palmer area?

A. Yes, sir.

Q. The Pocket area, in there?

A. Yes, sir.

Q. And you are how old, sir?

A. Be 35 December 4th.

Q. Have you ever been a member of the United Mine Workers of America?

A. Yes, sir.

Q. For how many years?

A. Oh, I don't know, off and on all the time I was
230 working in the mines.

Q. Now, were you with a group of men that were scheduled to go in and open up Gray's Creek mine the morning of August 15th and 16th?

A. Yes, sir.

Q. Did you go over in that area the 15th, Monday morning the 15th?

A. Yes, sir.

* * * * * * *

Q. Did you go on down to the mine site?

A. Yes, sir.

Q. The morning of the 15th?

A. Yes, sir.

Q. Now, did you start opening the mines there the morning of the 15th?

A. No, sir, there were some fellows there that stopped us.

Q. All right, now, without going any further into what was said, did you leave then after that?

A. Yes, sir.

231 Q. All right. Now, before you left, did you see where the area had been bulldozed off for the opening of the mines?

A. Yes, sir.

Q. And that is where you were scheduled to work?

A. That's right.

Q. All right. Now, when you left there, after you say what happened there on the 15th, did you go on home?

A. Yes, sir.

Q. Did you go back over there anymore that afternoon?

A. No, sir.

Q. Did you go back the next morning?

A. No, sir.

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Cross-Examination,

By Mr. Kramer:

Q. When were you employed, on Sunday?

232 A. No, it was on Friday, I think it was.

Q. Are you sure about that?

A. On Friday or Saturday, either one. I wouldn't say for sure.

Mr. Kramer: That's all. Did Mr. Gibbs employ you on this Friday or Saturday?

A. No, sir.

Q. Who talked to you about the job?

A. Johnny King.

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DESMER CHURCH,

having first been duly sworn, testifies as follows:

Direct Examination,

By Mr. Van Derveer:

Q. Will you state your name, please?

A. Desmer Church.

233 Q. Where do you live, Mr. Church?

A. I live in Tracy City.

Q. Are you a miner?

A. Yes, sir.

Q. Do you belong to the United Mine Workers?

A. Yes, sir.

Q. For how long?

A. Well, ever since they had a union.

Q. Are you a member of the Mine Workers as of this moment?

A. Yes, sir.

Q. Right now?

A. Yes, sir.

Q. Now, Mr. Church, you were one of the men that was actually on the picket line over there?

A. Yes, sir.

Q. Blocking Gray's Creek Road?

Mr. Kramer: I object to this leading, let him testify.

Q. All right, where were you?

A. I ain't working anywhere now.

Q. No, I'm talking about the 15th and 16th of August, 1960. Where was this picket line?

A. Well, it was out on the mountain there, I reckon, out by Gray's Creek.

234 Q. We're aware it was out on the mountain. I'm going to hand you a photograph here, which has been identified as Plaintiff's Exhibit No. 3, and see if you can identify that area?

A. Yes, sir, I can.

Q. Now that is Plaintiff's Exhibit No. 3?

A. I think it's right.

Q. All right, what does it show?

A. It shows—Now, I ain't for sure, but I think this is Pocket Road, ain't it?

Q. Yes, sir.

A. And this is the Gray's Creek Road?

Q. Yes, sir. Now, hold that up and point out to the jury where you all had this picket line?

A. Well, we was right over there, to the left.

Q. Now, you are pointing at what?

A. Well, the turn in the road that goes down to Gray's Creek here, we was right in here. Off on both roads.

Q. Just take this pencil and put an "X" where the line was.

A. I assume it was right along there.

Q. Well, the picket line was over the entrance to the Gray's Creek mine, is that correct?

A. Well, I think so.

* * * * * * * *

235 Q. How long did you stay there?

A. Well, I don't know.

Q. When you say you don't know, you don't know whether it was an hour or a week or a month?

A. Well, I couldn't say positive. It has been so long I've forgot just exact.

Mr. Van Derveer: Now, may it please the Court, we

think this witness should be required to answer the question.

The Court: Well, proceed.

Q. While you were there, did you see any fire arms?

A. What do you mean by fire arms?

Q. Rifles or pistols or shotguns?

A. Well, if I did it was somebody hunting or something.

Q. You saw none at all there on the picket line?

A. Well, if I did it was somebody come along hunting or something. The best I recollect. If somebody come along hunting, I might have seen something.

Q. Now, you weren't over there the morning of the 15th and 16th, were you?

A. Well, I couldn't say for sure.

Q. Monday morning, the 15th of August, 1960; or
236 Tuesday morning the 16th of August, 1960? Were you over there Monday or Tuesday, the 15th and 16th of August?

A. Well, I never kept up with it, I don't know for sure.

Q. You were part of the United Mine Workers mob there that day, do you remember that?

A. Sir?

Q. Do you remember whether you were a part of the United Mine Workers mob there that day?

A. Well, I didn't see no mob myself.

Q. Did you sometime after this go to the home of Mr. Paul Gibbs and convey a certain message to him?

A. No, sir, I don't think so.

Q. You never went to his home and told him anything about what could or might happen, so forth?

A. No, sir, I don't think I went to his home at all.

Q. Did you, as a result of being on that picket line, draw strike benefits, or what the union calls relief of distressed members, from the union?

A. Well, I don't know about that, now. I know I drawed some, but I don't know whether it was a result of being on the picket line or not.

Q. How much did you draw?

A. $25 a week.

Q. For how many weeks?

A. Well, I couldn't say for positive how many weeks.

237 Q. Well, isn't this the only picket line you were on?

A. Sir?

Q. This is the only picket line you were on, wasn't it?

A. At that time I think it was.

* * * * * * *

Q. What were you all hunting up there in August?

A. We wasn't hunting anything at all.

Mr. Van Derveer: That's all.

Cross-Examination,

By Mr. Kramer:

Q. Do you recall, Mr. Church, whether the money you received was in November, or began in November, 1961, or do you know when it was?

A. No, sir, I never kept up with it.

Q. You can't give us any idea when it was?

238 A. Well, I don't know for sure, I'd be afraid to say.

Mr. Kramer: All right, that's all.

Witness excused.

GEORGE RAMSEY,

having first been duly sworn, testifies as follows:

Direct Examination,

By Mr. Van Derveer:

Q. Will you state your name, please, sir?

A. George Ramsey.

Q. Where do you live, sir?

A. Monteagle.

Q. And in what business are you engaged?

A. I'm in the coal business, coal stripper.

Q. Where is your stripping operation, your mine?

A. It's about four or five miles out of Tracy City.

Q. Toward what?

A. Toward Palmer.

Q. How many men do you employ there, Mr. Ramsey?

A. About 20.

Q. Who do you sell your coal to?

A. TVA and the cement company.

Q. Is there a ready market for all the coal that you have?

A. Yes, sir.

Q. How do you get your coal from the mine site to
239 the delivery point of TVA or the Cowan plant?

A. To the TVA, we truck it over to the railroad.

Q. Which road?

A. We have our own haul roads.

Q. How far is that from the mine?

A. About two miles.

Q. And, how do you get your coal over to the Cowan place?

A. It's trucked on the highway.

Q. Now, whose trucks are used?

A. I'm using my own, now.

Q. Now, in addition to that, the coal that you mine and haul yourself, in times past have you contracted out some of your hauling?

A. Yeah.

Q. In addition to the sales that you make, do you just sell some coal there at the mine site?

A. Yes, sir.

Q. So, you do business by all those methods?

A. Yeah.

Q. Do you know Mr. Paul Gibbs, here?

A. Yes, sir.

Q. How long have you known him?

A. About 12 years.

Q. Has Mr. Gibbs ever hauled any coal for you?

240 A. Yes, sir.

Q. If you can remember, Mr. Ramsey, where was this coal hauled to?

A. The first coal I ever sold Paul was to haul to the cement plant at Richard City.

Q. Yes, sir.

A. Then he hauled some to Cowan different times.

Q. In Mr. Gibbs' own trucks?

A. In his own trucks, yes, sir.

Q. Now, in addition to that, in times past, have you ever actually sold any coal to Mr. Gibbs? In other words, has he just bought coal from you?

A. Yes, sir.

Q. Do you have a hauling contract today?

A. No, sir.

Q. Have you in the last few weeks or months sold any coal to Mr. Gibbs?

A. No, sir.

* * * * * * * *

Q. Are you aware of the events that took place in relation to Mr. Gibbs on the 15th and 16th of August, 1960?

241 A. Yes, sir.

* * * * * * * *

265 Afternoon Session.

(In the presence of the jury.)

GEORGE RAMSEY

recalled for further examination.

By Mr. Van Derveer:

Q. Now, Mr. Ramsey, at the adjournment during the noon hour you were on the stand, I believe, at that time. Now, you are not doing business with Mr. Paul Gibbs today, are you?

A. No, sir.

Q. Now, sometime after the events which have been related to the jury as occurring on the 15th and 16th of August, 1960, state whether or not there was a march on your mine?

A. Yeah, they come over there. I was told to——

Q. Go ahead.

Mr. Kramer: We object——

Q. Not what you were told, now, but there was a march on your mine, is that correct?

A. That's right.

Mr. Van Derveer: You may ask him.

Mr. Kramer: Due to the fact the answer had come before my objection, I move to strike his——

The Court: Yes, sustain the objection, and strike that portion of the testimony as to what he was told. Not that would not be considered by the jury.

266 Mr. Kramer: We have no questions.

The Court: In order that we may keep the record

straight, the Court has sustained the objection, and this was not entered in the record, the fact that the Court had sustained the objection of the defendant to testimony of Mr. Ramsey made prior to the lunch hour.

HOUSTON BEAUMONT,

having first been duly sworn, testifies as follows:

Direct Examination,

By Mr. Van Derveer:

Q. I believe, sir, that you are Mr. Houston Beaumont?

A. That is correct, sir.

Q. And where do you live, Mr. Beaumont?

A. Sewanee, Tennessee.

Q. In what business are you engaged?

A. Coal mining.

* * * * * * *

Q. And with what company are you connected?

267 A. Tennessee Consolidated Coal Company.

Q. At the present time, what position do you hold with the Tennessee Consolidated?

A. Vice-president and secretary.

Q. Where do you maintain your office?

A. Tracy City, Tennessee.

Q. And where in Tracy City?

A. Right in the center of Tracy City.

Q. Now, first, let's go a bit into the background of your employer. Who is president of this company?

A. Mr. Paul B. Callis.

Q. You are the vice-president?

A. Yes, sir.

Q. And the other officers of the corporation are whom?

A. Mr. Stanley Hampton, chairman of the board; Mr. William B. Allison, treasurer.

Q. Now, let's jump back, Mr. Beaumont, to the 15th and 16th of August, 1960. Who, at that time, was president of the Tennessee Consolidated Coal Company?

A. Mr. Stanley Hampton.

Q. And who was the vice-president?

A. Mr. Everett Roberts, Sr., was vice-president; Mr. Paul Callis was vice-president in charge of sales.

Q. And, your position at that time?

A. Secretary.

268 Q. And Mr. Allison's position?

A. Mr. Allison, I'll have to qualify my answer, Mr. Allison came with the company in February of 1960 as an employee, he was elected treasurer of the company in either late May or early June.

Q. Now, Mr. Beaumont, let's go back, and the next few questions will be directed toward the 15th and 16th of August, 1960, or dates in close proximity thereto. What was the Grundy Mining Company?

A. It was a wholly-owned subsidiary of Tennessee Consolidated Coal Company.

Q. Who were the officers of the Grundy Mining Company?

A. Mr. Judson Harwood was president.

Q. Now, who is Mr. Harwood?

A. He is an attorney in Nashville, Tennessee.

Q. And, who were the other officers of the Grundy Mining Company?

A. Mr. Roberts—I was not an officer of the company at that time, and my recollection is that Mr. Everett Roberts was vice-president in charge of operations for Grundy, and Mr. Paul Callis was treasurer.

Q. Now, Mr. Beaumont, state whether or not the Tennessee Consolidated Coal Company and/or the Grundy

Mining Company, again in the 15th and 16th of August, owned any land, coal producing lands, over in the
269 area, the Whitwell-Tracy City-Palmer area?

A. Tennessee Consolidated Coal Company had extensive holdings in that area, many thousands of acres of coal-bearing land.

Q. Many thousands of acres?

A. Yes, sir.

Q. Now, by what methods—what methods were employed by your company to mine that coal? Did you operate them yourselves or lease arrangements, or what arrangements did you have, sir?

A. There were two types of mining prevalent in the area. One, deep mining, which is drift mining by shaft, driven straight inside the hillside and into the side. Then, strip mining. Tennessee Consolidated Coal Company, at that time, did not have a mine operating. Grundy Mining Company had been formed for the purpose of operating mines on Tennessee Consolidated Coal Company's properties. Prior to August 15th, 1960, Grundy was not operating any coal mines. Whitwell Coal Corporation was operating a strip mine on lands owned by Tennessee Consolidated Coal Company. I believe that answers your question.

Q. In addition to those mines——

A. I beg your pardon, sir, I have overlooked one important feature of operation on our property. There were at that time in the neighborhood 15 individually
270 operated mines on our property that operated under lease arrangements with Tennessee Consolidated Coal Company.

Q. Now, without going into the details of each particular lease, but so the Court and jury will understand, outline for us the method under which an operator would

mine coals under a lease arrangement, who marketed the coal, the royalty if any, and so forth?

A. Generally speaking the operator was in full charge of his mine. He operated it, hired employees, anything necessarily associated with the management, and control of the mine. He had a lease arrangement with Tennessee Consolidated Coal Company under which he was given a block of coal, as it is known in the industry. He used whatever mining methods he thought best for his purposes to extract the coal. It was a fairly common practice for the land owner in the area to buy production from these small operators unless they had already sold to other sources. At that time the leases were in effect and Tennessee Consolidated Coal Company had—I'll have to be careful, Mr. Van Derveer, the dates, I want to be careful of them. Tennessee Consolidated Coal Company had had a contract for the delivery of coal to the Tennessee Valley Authority that ran out in March. As of August I don't recall that there were any of those small mines operating. If they were, they were not going at the normal rate of production.

Q. Generally speaking, then, the Tennessee Con-
271 solidated Coal Company marketed the coal, is that correct?

A. Yes, sir, but it was not contractually bound to market it, because under the lease arrangement if they could not sell it, the operator had a right under his lease agreement to market his coal otherwise.

Q. Now, sometime prior to the 15th of August, 1960, specifically early during the early part of the year 1960, did the Tennessee Consolidated Coal Company or Grundy Mining Company have a contract with the United Mine Workers of America?

A. Tennessee Consolidated Coal Company had a con-

tract with the United Mine Workers of America that was in effect until March 15th, 1960.

Q. Now, Mr. Beaumont, there has been introduced here into evidence what has been referred to as the National Bituminous Wage Agreement of 1958. Is that the contract?

A. That is the contract that I referred to.

Q. I believe, sir, that you have been in the coal business for many years, have you not?

A. Yes, sir.

Q. And is that, as far as the union is concerned, a uniform contract or a contract uniform throughout the nation?

A. Yes, sir.

Q. Now, you have told us that you had a contract with the United Mine Workers up until a given date?

272 A. Yes, sir.

Q. Now, what happened on that date?

A. The contract term expired by virtue of 60 days notice given on approximately January 15th, in accordance with the provisions of the contract. That notice was given by Tennessee Consolidated Coal Company for the purposes of terminating that contract.

Q. And, those communications terminating this contract, if you recall, sir, went to whom?

A. My recollection is that they went to all officers of the International Union and officers of District Union, specifically Mr. James Ridings.

Q. Mr. Ridings?

A. Yes, sir.

Q. And you said the other officers, I presume in Washington?

A. My recollection is they went to all senior officers of the United Mine Workers in Washington. Mr. Lewis, Mr. Kennedy and Mr. Boyle.

Q. Now, Mr. Lewis, that is Mr. John L. Lewis.

A. Mr. John L. Lewis.

Q. Mr. Kennedy was who, sir?

A. Mr. Tom Kennedy was president of the United Mine Workers. Mr. W. A. Bohr is vice-president of the International Union.

273 Q. That is B-o-y-l-e?

A. Yes, sir.

Q. Now, on and after that date, and at all other times involved in this litigation, was there any sort of contractual relationship between the Grundy Mining Company or Tennessee Consolidated Coal, and the United Mine Workers of America?

A. No, sir.

Q. So, at all times hereafter we are dealing with the situation where there is no contractual rights or obligations?

A. That is correct, sir.

Q. All right. Now, the Grundy Mining Company was to begin its operations in what area over in your fields?

A. The area known as Gray's Creek.

Q. Now, that has been a certain exhibit introduced into evidence identifying those fields. What preparations, if any, prior to the 15th of August, 1960, had the Grundy Mining Company made for the exact location that the mines would be opened in that area?

A. They had engineered out the locations for 10 mines in the general area of Gray's Creek.

Q. Let me go back just one moment. Now, you know Mr. Hampton, do you not?

A. Yes, sir.

Q. Know his signature?

A. His secretary?

274 Q. His signature.

A. Oh, I beg your pardon, yes.

Q. You would recognize it?

A. Yes.

Q. I hand you a written exhibit and see if you can identify it.

A. Yes, I recognize the letter and Mr. Hampton's signature.

Q. I'll ask you, sir, if you will identify that and give it to the reporter and let the reporter mark it as an exhibit and introduce it into evidence.

Plaintiff's Exhibit No. 31 tendered and received in evidence.

Mr. Van Derveer: With the permission of the Court, I would like to read this letter to the jury, it's very short. Ladies and gentlemen, the letter is as follows, dated January 14th, 1960, addressed to Mr. James Ridings, President, District 19, UMWA, Box 116, Middlesboro, Kentucky. "In relation to the Tennessee Consolidated Coal Company of Tracy City, Tennessee. Dear Sir and Brother: Enclosed herewith is a copy of a self-explanatory communication dated January 12, 1960, from Stanley Hampton, president of Tennessee Consolidated Coal Company, which is the signatory to the National Bituminous Coal Wage Agreement of 1950, as amended effective December 1, 1958, by membership in the Southern Coal Pro-
275 ducers Association. Would you please advise this office with respect to the contract status of the Tennessee Consolidated Coal Company subsequent to March 15th, 1960."

Q. Now, before we get into this Grundy matter, and Mr. Gibbs, Mr. Beaumont, a few more questions. As a result of this correspondence which has been introduced into evidence here and described as Plaintiff's Exhibits No. 30 and No. 31, did you, or to your knowledge did any other office with your company, meet with Mr. Ridings?

A. Repeat your question, please.

Q. After cancellation of this contract——

A. That is the point I need to get clear. Do you mean the notice of cancellation of the actual effective cancellation?

Q. At any time after the notice, did you or any member of your company, to your knowledge, meet with Mr. Ridings?

A. Yes, sir.

Q. Now, where were those meetings?

A. One meeting took place in Knoxville, and the second meeting took place here in Chattanooga, I believe in the Patten Hotel.

Q. Now, Mr. Beaumont, did you personally attend those meetings?

A. Yes, sir.

Q. Who or what officials of the United Mine Workers of America attended those meetings?

276 A. Mr. J. W. Ridings, president of District 19; Mr. Albert Pass——

Q. Who, I believe, is also——

A. Secretary-treasurer, I believe, of District 19.

Q. Yes, sir.

A. I believe Mr. George Gilbert, who is district representative of District 19, was present. That's all I can recall of the representatives of District 19. There were other union representatives present.

Q. Yes, sir. Now, did those meetings that you have outlined to us, both here and in Knoxville, result in the renewal of a contract or a new contract?

A. They were wholly fruitless.

Q. All right, sir. Can you now, with some reasonable degree of certainty, tell us when those meetings took place, or do you recall?

A. I can't recall the specific date, my recollection is one occurred in February, and perhaps the other occurred sometime in March.

Q. All right, sir.

A. I can't say the exact date.

Q. And those meetings, as you have told us, were fruitless?

A. Yes, sir.

277 Q. Now, let's get back to the Grundy Mining Company. And you've told us before, I believe, a certain area had been engineered for the opening of mines?

A. Yes, sir.

Q. Now, how many mines were to be opened there?

A. My recollection there were 10 mines to be opened. I'm not in the operating part, therefore I was not familiar with the engineering details, but it is my recollection that there were 10 mines laid out to be opened in the area.

Q. Now, as coal mines go, and believe me I know but little, and I believe the jury is with us on most of this; was that area a good coal area or a fringe area?

A. It was considered one of the very best areas of coal in the entire Sewanne seams.

Q. All right, sir. Now, prior to the 15th or 16th of August, 1960, did you know the plaintiff here, Mr. Paul Gibbs?

A. Prior to the 15th or 16th?

Q. Yes.

A. No, sir, I did not.

Q. Do you recall when you first met Mr. Gibbs?

A. My recollection of when I first met him was in Monteagle, I believe it was the evening of August 16th, after dark or just soon after dark, in Monteagle, Tennessee.

Testimony of Houston Beaumont

Q. Now, we are speaking now of the evening of the 16th of August, 1960?

A. 1960, yes.

* * * * * * * *

278 Q. Now, Mr. Beaumont were you in the Dogwood Flat area, the new Grundy mine area, at anytime
279 at all on the 15th or 16th of August, 1960?

A. I was not, sir.

Q. You had no occasion to go there. Now, you have heretofore told us that you did, however, meet Mr. Gibbs later in the afternoon or early in the evening of the 16th, did you not?

A. That is my recollection of the date.

Q. And, where was it that you met him?

A. Monteagle, Tennessee.

* * * * * * * *

Q. You did meet Mr. Gibbs?

A. Yes, sir.

* * * * * * * *

280 Q. All right. Subsequent to that, did you actually see these roving miners?

A. I saw two cars of them in Monteagle.

Q. All right, sir. Now, let's get back to the original question. You did meet Mr. Gibbs?

A. Yes, sir.

Q. Who, if anyone, was with you at the time you did meet Mr. Gibbs?

A. Mr. Paul Callis and Mr. William Allison. He and his wife were actually present in his car when I met him.

Q. You mean Mrs. Gibbs?

A. Mrs. Gibbs.

* * * * * * * *

289 Q. Mr. Beaumont, when the jury was excused you had told us that you had met Mr. Gibbs there that evening, which was the evening of the 16th?

A. Yes.

Q. Now, after that, how long was it that the Gray's Creek area of the Grundy mine area remained dormant before any work was done there?

A. There may have been a little work on the roads between the dates. As to direct efforts to mine coal, there was no work in the Gray's Creek area from the date of the 16th of August, 1960, until, guess, July of 1962.

Q. Now, did any activity at all take place in that area as it relates to whether any mining did or did not take place, during that interval? No activity?

A. Not to my knowledge, sir.

Q. Now, after that, were the mines opened there?

A. After what, sir?

Q. After the dates you gave?

A. Yes.

Q. You did open the Grundy mines?

A. The Grundy mines were opened.

Q. I hand you a certain photograph here, sir, and I'll ask you if you can identify this? Is that one of the mines today?

A. This is one of the mines in the Gray's Creek area that was opened subsequent to——

290 Q. I'll ask you, sir, if you will mark that as an exhibit to your testimony?

A. Yes.

Reporter: No. 32.

Plaintiff's Exhibit No. 32 tendered and received in evidence.

Q. Now, how many mines are there now operating in that area?

A. Counting the mine shown in the picture, I believe there are now eight active mines. There are seven in the development stage, and there are two more, making a

total of 11 mines. The last two have not actually gone into production. The preliminary work has been done.

Q. There are how many in active production today?

A. There are eight.

Q. Now, you may not have the exact figure, but if you do, tell us what it is. What is the daily production of those eight mines now?

Mr. Kramer: We object to that, your Honor, as being irrelevant and immaterial to any issue in this lawsuit.

* * * * * * *

291 The Court: Can you tell us whether they are related to the mines that are now operating, or are they in any way related to the mines that were scheduled for opening?

A. They are related in this respect, Judge. It is a belated accomplishment of what we started out to do in 1960.

The Court: What I'm asking, are the mines you are now operating the mines that you were going to open at that time?

A. The mine shown in the picture that was made an exhibit is at the exact location where the first two mines to be opened by Mr. Gibbs were laid out.

The Court: I believe I'll overrule the objection.

Mr. Kramer: It is our understanding that these are being opened on an entirely different basis, an entirely different type of mining than anything contemplated back at the time of the alleged——

Mr. Van Derveer: May it please the Court, our question is limited to one very narrow issue, the daily production.

Mr. Kramer: Isn't it true, Mr. Van Derveer, that these are being operated on an entirely different manner
292 than what was contemplated in——

* * * * * * *

293 Q. Mr. Beaumont, what are the mines producing today?

A. To properly answer your question I must repeat a portion of an answer I gave you previously. The mine in the picture, entered as an exhibit, is now producing at the approximate rate of 1200 tons today.

Q. That's at one mine?

A. One mine. Two shifts per day. The other seven mines now in production are still in the development stage. That means that the development of the mines has not gone far enough to reach their average expected productivity per day.

Q. Is the size of these other mines smaller or larger than the one in actual operation?

A. Smaller, sir. They are rated at approximately, at a minimum tonnage per week, of 1000 tons each.

Q. 1000 tons per week?

A. Right.

Q. Now, you say that the Grundy Mining Company is actually operating these mines today. Now, explain to us the way that you operate, meaning do you have a foreman for this mine in actual operation?

A. You say "this mine", do you mean the one in the picture or the others?

Q. The one in this picture.

294 A. At that mine we have a superintendent and a mine foreman.

Q. A superintendent. Now, how many superintendents do you have there that you are today using in your operations?

A. We have a general superintendent, Mr. Gene Ford, who is directly responsible for the mine shown in that picture, and he is also responsible for the mine property, but not specifically responsible for the remainder of the small

mines in Gray's Creek. Mr. Bill Kennedy, an engineer, is in charge of those.

Q. Now, who do you have other there now actually operating those mines in the same comparable position that Mr. Gibbs would have been in back on the 15th and 16th of August?

A. Well, there are ten individuals, my recollection from the last payroll, seven of them are on Grundy's payroll as mine foreman. Those mines are active. I think maybe eight of the small mines went in this week. In other words, began work producing coal this week. That leaves, I believe, two more of the smaller mines to go and they have been assigned to foremen.

Q. Now, you have hired, then, a number of men since the 15th and 16th of August, 1960?

A. Yes, sir.

Q. Now, why didn't you hire Paul Gibbs?

Mr. Rayson: Your Honor, we object to this . . .

A. Am I to answer?

295 The Court: No, just a moment. Mr. Beaumont, do I understand you do or do not hold any position in Grundy? I understood you to say . . .

A. I do now, sir; I did not in 1960. I do now, sir; I am vice-president.

The Court: I believe I'll overrule the objection.

A. Would you repeat the question?

Q. Why did you not hire Mr. Paul Gibbs?

A. Because as a matter of business judgment. Had I hired Mr. Paul Gibbs none of these mines would be open today.

Q. Closed by whom?

A. The members of the United Mine Workers of the area.

Mr. Kramer: Your Honor, I move to strike those last two answers because they are conclusions of the witness.

Mr. Van Derveer: We submit that is fact and is admissible as such.

The Court: I'm going to reserve any opinion on that matter at this time.

Mr. Van Derveer: That is all.

Cross-Examination,

By Mr. Rayson:

Q. Mr. Beaumont, the mine showed in Exhibit No. 32, is this the mine opened by your company by Allen and Garcia?

A. They did the engineering work, yes, sir.

Q. And you say this one was opened in July of 1962?

296 A. I believe the initial work was done in July, 1962.

Q. Now, Allen and Garcia is an engineering firm from Chicago?

A. Yes, sir.

Q. And they had many executives down here to open this mine for you?

A. One, sir.

Q. He had several other people on your payroll or that you paid?

A. Would you repeat your question?

Q. Allen and Garcia Engineers had several people; in fact, they had 50 or 60 employees on their payroll, which payroll your company, Tennessee Consolidated Coal Company, reimbursed, is that not correct?

A. That is correct.

Q. And it was this company, Allen and Garcia, which opened that mine, is that right?

A. I'll give you a qualified yes, sir.

Q. All right.

A. The mine was opened by them, but it was not brought to full development by them.

Q. I see. And during that time you were paying this company $2,000 a month over and above all of their expenses, is that correct?

A. Yes, sir.

297 Q. And you also agreed to pay them a certain amount on each ton of coal they were to remove from the mine, is that not correct?

A. To answer that question I'll have to qualify my answer to the first question in this regard. The $2,000 was a drawing account against the tonnage rate which was to be paid after development of the mine. In other words, so much a ton, based on the various levels of production.

Q. How much new equipment did your company buy to put in this mine?

A. I'm not an authority on the money end of it, our treasurer is, but my estimate is approximately $500,000 worth of new equipment.

Q. And all of this equipment was bought long since, or, rather, this equipment was bought when you reopened your Coal Valley mine in the spring of 1961, was it not?

A. The renovation of the Coal Valley mine started in the spring of 1961, I think a study of equipment to be purchased was made about the same time. I can't say that the purchase occurred at the same time, but it was not too long after the initial clean up started.

Q. You are not suggesting to the jury, are you, Mr. Beaumont, that this was a kind of mine Paul Gibbs was going to build, are you?

A. No, sir, I didn't suggest that to the jury.

298 Q. He was going to open what you folks call a "dog hole" mine, wasn't he?

A. He was not, sir.

Q. Don't you—how many other mines do you have on that property?

A. On which property?

Q. On your property.

A. Do you mean our entire property?

Q. Yes.

A. How many mines do we have?

Q. Yes.

A. We have only those that I have named to you, sir.

Q. How many other mines have you leased out?

A. I believe there are 10 or 11 mines elsewhere on the company property operating under lease arrangements.

Q. Those are mines which employ something like six or eight men per mine?

A. Frankly I don't know what they employ, sir. I have heard different tales.

Q. That's right, and they produce something like five or six tons a day per man, don't they?

A. The lowest figure I've heard is eight tons.

Q. Eight tons per day per man?

A. I said the lowest figure, sir, since you raised the point.

299 Q. How much per tons per man does this mine produce?

A. I don't know, sir, without calculating.

Q. It is something like 35 or 40 tons per day, isn't it?

A. No, I don't think it is, sir.

Q. It's not eight tons per day, is it?

A. No, sir.

Q. It's a long way from it, isn't it?

A. Yes, sir.

Q. This is a highly mechanized mine, isn't it?

A. Yes, sir.

Q. The most highly mechanized mine in southern Tennessee?

A. To the best of my knowledge, it is.

Q. And these mines that you say produce something like eight tons per day per man are mines——

A. I don't say that, sir, I merely repeat what I am told. I do not assure you that they mine eight tons or any other figure because I don't know, sir.

Q. How long have you been employed by that company as an executive, Mr. Beaumont?

A. A little over six years.

Q. And these other mines——

A. I beg your pardon, Mr. Rayson. Since you asked me that question may I comment for the record that that question is a form of inference to me that I don't know what is going on, and I would like to reply in this
300 manner. It is not my business to run those coal mines, it is the operators' business. They are leased, and we do not interfere in their management. Our concern is to see that the royalty is paid, that if the coal is mined it is extracted sufficiently so none is wasted. Any other information I have is hearsay.

Q. You do sell the coal that comes from these mines, don't you?

A. We do, sir.

Q. And those mines produce, if they are lucky, four or five hundred tons of coal per week, don't they?

A. No, sir. They produce considerably more than that, on an average.

Q. Would you say 750 tons?

A. No, sir, I'd say more than that.

Q. Would you say that produce 1000 tons a week?

A. The majority of those mines will produce in the neighborhood of 1000 tons each per week.

Q. All right. And those are mines in which men go to work with picks and shovels and hand load coal, is that not correct?

A. As far as I know, they are so-called hand-loaded mines.

Q. And instead of taking the coal out of the mines with highly mechanized equipment, it is drawn out by a mule drawing a cart, isn't it?

A. As far as I know, there is not a mule drawing
301 a cart on our property. If there is, I haven't seen it and I don't know about it.

Q. All right. Now, Mr. Beaumont, I want to go back to the spring of 1961. Would you state whether or not at that time your company entered into a contract with Allen and Garcia Company?

A. They did, sir.

Q. Did Allen and Garcia Company, for your account, re-open the Coal Valley mine?

A. They did, sir.

Q. Did Allen and Garcia Company operate that mine for your account for several months?

A. Yes, sir.

Q. And did not the Coal Valley mine, just prior to July, 1962, run into a serious fault in the coal?

A. Correct, sir.

Q. And did not some of that mine cave in?

A. Yes, sir.

Q. In fact I think you lost some of your new equipment in there, didn't you?

A. No, sir. Well, we lost a piece of damaged mine equipment that had a value of possibly $100, and a cart.

Q. And it was only after you ran into that trouble with the Coal Valley mine that you then went over to open the new mechanized mine at Gray's Creek, is that not correct?

302 A. In terms of sequence, yes.

Q. And, so, this mine, which you have shown to the jury in this photograph, Exhibit # 32, is actually

the mine that has taken the place of the Coal Valley mine, isn't it?

A. I assume you mean as a source of production?

Q. Yes.

A. Yes.

Q. In fact, the Coal Valley miners are working in this mine?

A. They are some of them working there now. Not all of them.

Q. Now, these other mines that you talk about. You say that you have seven others under development?

A. Seven others in production.

Q. In production?

A. Yes, sir.

Q. Four others under development?

A. Three others under development.

Q. And you have a general——

A. Sir, for the record, I said there were seven, the eighth had started production this week.

Q. Now, you are distinguishing those mines from the mines shown in picture # 32?

A. Right, sir. A total of 11 mines in that area.

Q. Are they going to be highly mechanized mines?

303 A. That depends on your term or what you mean by highly mechanized.

Q. In comparison with the mine shown in exhibit # 32, are they going to be mechanized mines?

A. Some of them will be what is known as mechanized, some of them semi-mechanized. There will be some hand loading.

Q. How many men will be employed in each of those mines?

A. The estimate for the 10 is approximately 150, or an average of 15 men per mine. That will vary, I understand. That part of the company's work is not under

my supervision and some of those details come to me only as general discussion. I am not familiar with the details.

Q. But you do know, I am sure, that the new Gray's Creek mine, a mechanized mine, has something like 40 or 50 employees working?

A. It does.

Q. Now, you say you have 10 foremen or so, I've forgotten the exact number, working in these other mines that you are producing or developing, is that correct?

A. I don't think they are all on the payroll now. As we finish the heavy bulldozing work and grading they start the preliminary work toward coal mining. That is when the foreman's job begins. He has nothing else to do until that work is started, and then he goes on payroll.

* * * * * * * *

304 Q. Now, what I'm asking you, is how many men as foremen have you employed on these other mines that you are opening or have opened in the Gray's Creek?

A. I believe as of last week there were seven men employed as foremen; one other, as I understand it, was to come on the payroll this week. They are two that will come on the payroll within the next two weeks.

Q. Those are the jobs that you say you did not consider Mr. Gibbs for?

A. That is correct, sir.

Q. You didn't offer him any of those jobs?

A. No, we certainly didn't, sir.

Q. Those are the jobs you pay men $25 a day for right now, aren't they?

A. Yes, sir.

305 Q. That's all you are paying these foremen that you are hiring to run these eight mines, or whatever they are, is that correct?

A. That's all we are paying them as of now, during the development stage, Mr. Rayson.

Q. That is all you have promised them and they have signed contracts to that effect, haven't they?

A. They have signed contracts as foremen to open and develop those mines.

Q. And you haven't promised them any trucking leases on the side, have you?

A. I have not, sir.

* * * * * * * *

306 Q. Now, can you tell me where you leased Mr. Gibbs and Mr. Sanders some land?

A. In the general vicinity of Tracy City.

Q. Can you point it out on this exhibit, please, sir?

A. I can if you will familiarize me with the exhibit.

Q. All right, I believe this has been introduced as a TVA map of the general area of Palmer, Tracy City, and Whitwell.

(Witness leaves the witness stand and marks an area on the exhibit.)

Q. Do you know how far that is from Tracy City?

A. I would say the nearest of our property boundaries would be in the neighborhood of three and a half, four miles I might be off a mile. I never thought to measure it.

Mr. Rayson: I think we are though, your Honor.

Redirect Examination,

By Mr. Van Derveer:

Q. Mr. Beaumont, why was this lease executed with Mr. Sanders' name on it?

A. Because I wouldn't give it to Mr. Gibbs by himself.

307 Q. Why wouldn't you?

A. Because I think it would have been a waste of

time to have written the lease with him, he would never have had the opportunity by himself to mine coal.

* * * * * * * *

Q. Now, on that mine, and as good coal mining areas go, is the Gibbs-Sanders' mine in a good, bad, or scavenger region?

A. I class it as scavenger for this reason. Virtually all the coal that could be mined out of that area has been mined and removed. What is left is out-crop coal that is broken at short intervals by the shafts of old, deep workings. There is very little solid coal there and certainly no virgin coal, as the expression was used by Mr. Rayson a while ago.

308 Q. Now, Mr. Rayson used the expression 'virgin coal.' Is the Gray's Creek area virgin coal?

A. It was virgin coal.

Q. Prized land?

A. Prized land.

Q. Now, why was it that you gave Mr. Gibbs and Mr. Sanders that area way over there?

A. I gave it to him because I didn't think it was possible for him to open a deep mine where we had virgin coal that was mineable by deep-mine methods, because of the common knowledge in the community——

Q. Answer no further, let's reserve that. Answer me one further——

A. Might I say this. My concern was to get the coal mined. I saw no point in giving a man a lease in an area in an area or under conditions where he could not mine the coal.

Q. Now, one remaining question and then we will come back to these others. Has Mr. Gibbs tried on few or many occasions to get you to give him leases in other or better areas?

A. In many instances.

Q. Now, do you have available better coal land in other areas?

A. Yes, sir.

The Court: Let's take just a few minutes recess.

Recess.

309 The Court: Ladies and gentlemen of the jury, you will please disregard that portion of the testimony of Mr. Beaumont in which he stated that they did not hire Mr. Gibbs for reasons of business judgment. This statement of opinion on the part of the witness would not be considered as factual evidence by the jury on the issues in this case.

Mr. Van Derveer: Will the Court permit me to ask Mr. Beaumont one further question, and I will frame it this way. You did not rehire Mr. Gibbs, did you?

A. Did not, sir.

Q. And you did not execute to him another lease?

A. Except the strip mining lease.

* * * * * * * *

JOHN HIGGINS,

having first been duly sworn, testifies as follows:

Direct Examination,

By Mr. Van Derveer:

Q. Will you state your name, please, sir?

A. John Higgins.

Q. How old are you?

A. 49.

Q. Where do you live?

A. Whitwell.

* * * * * * * *

310 Q. Who do you work for, Mr. Higgins?

A. Now?

Q. Yes.

A. Grundy Mining Company.

• • • • • • • •

311 Q. Now, in the past, have you been a member of the United Mine Workers of America?

A. Yes, sir, I helped bring the charter to the club.

• • • • • • • •

Q. Now, when did you start back to work in the mine fields for the Grundy Mining Company?

A. It has been about two months and a half.

Q. Now, what are your duties there with Grundy at the present time?

A. Foreman.

Q. Foreman of what mine?

A. It's a truck mine.

312 Q. One of the new mines?

A. Yes, sir.

Q. Do you know this Mr. George Gilbert?

A. Yes, sir.

Q. Do you know Mr. Paul Gibbs?

A. Yes, sir.

Q. Now, what statements—let me rephrase that. Have you attended union meetings there at which Mr. Gilbert was there also?

A. Yes, sir.

Q. Have you been in Mr. Gilbert's home?

A. Yes, sir.

Q. Has he been in your home?

A. Yes, sir.

Q. Now, what statements, if any, has this Mr. Gilbert made to you about or relating or pertaining to Paul Gibbs working over in that area since August the 15th or 16th, 1960?

• • • • • • • •

Q. The first time you discussed Mr. Gibbs with Mr. Gilbert or Mr. Gilbert discussed him with you was when?

A. About when the new union was going in there, the first time.

313 Q. You're talking about the new union? Do you mean on the 15th or 16th? Can you fix the date the best you can?

A. No, he come to my house off and on all the time.

Q. Mr. Gilbert did?

A. Yes, sir.

Q. Was this before the trouble there at—when they tried to open the Grundy mine? Was that the first time you talked to him, or after that?

A. Before that.

Q. Do you know how long before that?

A. No, sir, I couldn't . . .

Q. Weeks or months or what?

A. It was months.

Q. Several months before?

A. You said the Grundy mine, didn't you?

Q. Yes.

A. It was months before that.

Q. And, where did this conversation take place?

A. It was in my little old house, I had a little house, I batched at the time.

* * * * * * *

314 Q. The best you can, pinpoint the time. You started to say something, what was it?

A. It was while the trouble was going on with Mr. Gibbs, I was talking about, with the Grundy Mining Company. That was months apart, you know that, that was what I was talking about.

Q. You're talking about the first incident now?

A. I'm talking about the first incident is when I am talking about now.

Q. How many months before this Grundy incident was that?

A. Between Mr. Gibbs' trouble and the Grundy trouble?

Q. I think I'm not getting across to you or you to me. Now, when we are talking about the Grundy trouble, what we are talking about is the 15th and 16th of August, 1960.

A. We wasn't on the same track, then.

Q. Sir?

A. We wasn't on the same track.

Q. Are we on the same track now? All right. Did you talk to Mr. Gilbert at or about that time?

A. Yes, sir.

Q. Now, where?

A. At my house.

Q. And, can you tell us, as near as you can, whether
315 the meeting was before or after this first trouble when then tried to open the mines?

A. Well, it was while the picket line was going on out there, there was a picket line out there at the time.

Q. All right.

A. I asked him what all the trouble was, and he said, "Hell, we can't let that go on" said if we started to let that go on, said you know what would happen, it would all be like that.

Q. Yes, sir. Now, what statements, if any, did he make with regard to Mr. Paul Gibbs?

A. Well, he said Paul was trying to bring this other union in there, and he said he ain't going to get by with it.

Q. All right, sir. Now, that was that incident. Now, after that, did you have an occasion or any occasion to talk to Mr. Gilbert again?

A. Well, numbers of times, I couldn't say what the subject was all the time.

Q. All right. After that occasion did you have any conversation with Mr. Gilbert about Mr. Paul Gibbs?

A. No, personally, I wouldn't, because I was working over at Virgil's, I was working under contract.

Q. Now, you are familiar, are you not, with this area where the Gray's Creek road takes off from the Pocket Road?

A. Yes, sir.

316 Q. Did you ever pass there? Pass that area?

A. Yes, sir. I have stopped there.

Q. N[illegible] the best that you can recall, how long did that picket line stay there?

A. Six or eight months, I'd say, I don't know.

Q. Did you ever see Mr. George Gilbert there on that line?

A. He stopped there one time while I was there and he dropped off some food, the only time that I can recall that I ever saw him.

Q. Now, I believe, sir, that you have told us that you are working for Grundy?

A. Yes.

Q. How many others are there working for Grundy over there that have the same position that you do?

A. Six or seven.

Q. Can you name those for us?

A. Jeff Crabtree, Paul Hatfield, Harry Higgins, and myself, and the Johnson boy, I don't know his first name, and Mr. McCone, and Bill Myers.

Q. All right. Now, who was it that hired each of you fellows?

A. Paul Callis.

Q. Who is president, I believe, of the Grundy Mine?

A. Yes, sir.

317 Q. At the time that you all were hired, was the name of Mr. Paul Gibbs discussed?

A. Yes, sir.

Q. Was he hired?

A. No, sir.

Mr. Van Derveer: You may ask him.

Cross-Examination,

By Mr. Kramer:

* * * * * * * *

319 Q. You said you had a conversation with somebody connected with the United Mine Workers, didn't you?

A. When?

Q. Well, just after the trouble in August, 1960?

A. While they was having that trouble over there?

Q. Yes, sir. Who did you have a conversation with?

A. George Gilbert. He stopped at the house.

* * * * * * * *

321 Q. Did you know George Gilbert was coming there ahead of time?

A. No, sir, he just stopped by.

Q. Just stopped by to visit with you, and by himself?

A. Most of the time.

Q. Well, I'm talking about the time of this conversation?

A. Oh, yes, sir.

Q. By himself that time?

A. Yes, sir.

Q. How did the subject of Paul Gibbs come up?

A. I just asked him what the trouble was, and that is when he told what the trouble was. That's all I ever said.

Q. Before this conversation, had you seen him at the picket line?

A. That was after that I seen him.

Q. You mean after this conversation, at a later date, you saw him up there?

A. Yes, sir.

Q. You say he brought some food there?

A. Yeah, he was going into the Pocket for something and he raised his trunk and he had some food, and he went on.

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324 **HOWARD HIGGINS,**

after being duly sworn, the witness testified as follows:

Direct Examination,

By Mr. Van Derveer:

Q. Will you state your name, please, sir?

A. Howard Higgins.

* * * * * * * *

Q. Who do you work for now, Mr. Higgins?

A. Grundy Mining Company.

Q. How long have you been with the Grundy Mining Company?

A. Something like three months, I guess.

Q. What is your job over there?

A. Mine foreman.

Q. How long have you been in the mine business?

A. Do you mean as an operator, or mine foreman, or what?

Q. How long have you been in the whole kitten kaboodle; working in the mines, and all?

A. I went into the mines in 1930.

Q. And been there ever since?

A. Yes, sir.

Q. Both as a miner and as an operator?

A. That's right.

325 Q. Have you ever been a member of the United Mine Workers of America?

A. Up until 1960. September.

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Q. How many of these foremen do you have there with Grundy?

A. I ain't for certain, but I believe there's about seven.

Q. Seven. Now, who hired all of you?

A. Mr. Paul Callis.

Q. At the time that all of you were being hired by Mr. Callis, there, was the name of Mr. Paul Gibbs discussed?

A. Yes. It was.

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326 Q. Anyway, Mr. Gibbs was not hired, was he?

A. No, sir.

Q. And, of course, Mr. Gibbs is not working there today. Now, Mr. Higgins, let's get back to the events of August the 15th and 16th, 1960. Were you over in the area there, of the Pocket Road and the Gray's Creek Road?

A. No, sir. On that date I was in Middlesboro.

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327 Q. Did you go over to that area, and see what it was?

A. No, sir. I didn't. I wasn't in Gray's Creek. I went over to my other mines in the Pocket. It was in the same area, but not down in Gray's Creek.

Q. Did you see this group that was there?

A. Yes, sir. The road was full of picketers; of what I'd call picketers.

Q. Did you see any firearms?

A. No, sir. I didn't. I never stopped.

Q. You just went on by?

A. That's right.

Q. On down into the Pocket, I believe?

A. Into the Pocket. Yes, sir.

• • • • • • • •

328 **Cross-Examination,**

By Mr. Rayson:

Q. How long had you been an operator of the coal mine, over there in the Pocket, before you took a job as foreman for Grundy Mining Company?

A. I went to work for the Tennessee Consolidated Coal Company as an operator in 1946.

Q. You ran your own mine?

A. Yes, sir.

Q. And you ran it how long, Mr. Higgins?

A. Up until some time in August. I don't remember what date this year.

329 Q. Some time into August, this year?

A. Yes, sir.

Q. Did you have one of these mines that had ten or fifteen employees in it?

A. Off and on, anywhere from eight to fifteen, maybe twenty sometimes.

Q. And, yours was one of the Pocket Mines of Tennessee Consolidated Coal Company, that you had reached by going past this intersection——

A. That's right.

Q. At Gray's Creek?

A. Yes.

Q. How many of those mines were there?

A. You mean in the pocket?

Q. Yes, sir, of Tennessee Consolidated?

A. Well, I wouldn't know. There's about thirteen or fourteen of them.

* * * * * * * *

330 Q. In any event, you're now working as the foreman in one of these mines?

A. Yes, sir.

Q. Twenty-five dollar a day man, now. Is that your salary?

A. That's right.

Q. You don't do any hauling for those mines, do you, Mr. Higgins?

A. You mean trucking?

Q. Yes, sir.

A. Yes, sir, I do.

Q. Do you truck from your own mine?

A. Yes, sir.

Q. Do you own your own truck?

A. My son-in-law is doing the trucking. No, I don't own it. He does.

Q. You mean it's your son-in-law that does the trucking?

A. That's right.

Q. Does he own one truck?

A. Just one.

Q. You were in Middlesboro, Tennessee, or Murfreesboro, or where were you?

A. Murfreesboro, Tennessee.

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332 **PAUL B. CALLIS,**

after being duly sworn, the witness testified as follows:

333 **Direct Examination,**

By Mr. Van Derveer:

Q. I believe, sir, that you are Mr. Paul B. Callis, are you?

A. Yes, sir.

Q. Spelled C-a-l-l-i-s, is that right?

A. Yes, sir, that's right.

Q. By whom are you employed at the present time?

A. Grundy Mining Company.

Q. In what capacity?

A. President.

Q. What position, if any, do you hold at the present time with Tennessee Consolidated Coal?

A. President.

Q. Who are the officers, now, of the Tennessee Consolidated Coal Company?

A. Myself, Houston Beaumont, William B. Allison. Mr. Beaumont is Vice-President and Secretary, and Mr. Allison is Treasurer . . .

Q. And who of the . . .

A. Mr. Stanley Hampton is Chairman of the Board, without official capacity, and Mr. Everett B. Roberts is Chairman of the Executive Committee, without executive power.

Q. Who, sir, are the present officers of the Grundy Mining Company?

A. The same officers serving for Tennessee Consolidated.

334 Q. Now, let's jump back to the 15th and 16th of August, 1960. Who were the officers at that time of the Tennessee Consolidated Coal Company, and who were the officers of the Grundy Mining Company?

A. Mr. Stanley Hampton was President of Tennessee Consolidated; first, there was no Chairman of the Board of Tennessee Consolidated at that time. Mr. Stanley Hampton was President, Mr. Everett Roberts was Vice-President of Operations, Mr. Callis, myself, was Vice-President of Sales, Mr. Houston Beaumont was Secretary, and I believe I was serving at that time as Treasurer, due to the death of Mr. Byron Roberts. The officers of Grundy at that time were Mr. Harwood, an attorney from Nashville, serving in the capacity of President. There were no other official officers appointed at that time.

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Q. No. What I'm talking about is, are your duties primarily with sales or production of coal, or what? What do you do, primarily, with the company?

335 A. Today, production.

Q. Production. How about back in 1960 on the 15th and . . .

A. Sales. I was Vice-President in charge of sales.

Q. At that time?

A. Yes, sir.

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Q. Now, back to the fifteenth of March and up to all times since then, has the Tennessee Consolidated Coal Company and/or Grundy Mining Company operated without any sort of a contract with the United Mine Workers of America?

336 A. Yes, sir.

Q. And is that the way those businesses are being operated today?

A. Yes, sir.

Q. Now, following the exchanges of correspondence that you hold, state whether or not you, along with any other officers of either of these companies met with any of the officials of the United Mine Workers in regard to the renegotiations of a contract?

A. Speaking now for Tennessee Consolidated?

Q. Yes, sir.

A. Yes, sir.

Q. Where did those meetings take place, who was there, and the best you can, the dates?

A. Are you speaking now on or after the termination, the effective date of the termination?

Q. On and after the effective date . . .

A. Or on and after the notice?

Q. Let's take it on and after the notice.

A. On and after the notice, we met officially in Knoxville with the officials of District 19 and the officials of Local 581. We met a second time, but that meeting was adjourned for a second meeting in Chattanooga; then there were subsequent meetings conducted by Mr. Roberts at Palmer, in the interest of saving the expense of travel. Those meetings took place between I'd say January the 1st and March the 15th. They could be a little one
337 way or the other.

Q. What officials of the union, meaning District 19, were at either of these meetings?

A. Mr. Ridings—President of District 19, Mr. Task and Mr. Gilbert, Mr. Harvey Brown, Mr.—several of the local men. I can't recall the names, but a total of 13 or 14 union officials between the local at Palmer and the District 19.

Q. Among those, in addition to those union officials from District 19 in Middlesboro, if I understand your testimony correctly, there was some of the local officials of local unions, both 7083 and 5881. Is that correct, sir?

A. I am not sure about 7083, but I am sure about Local 5881.

Q. Did some of those meetings also take place in Palmer?

A. Yes, sir.

Q. Which is your headquarters, isn't it?

A. Well, after the meeting in Knoxville and the meeting in Chattanooga, then Mr. Roberts met with them on a local level.

Q. Did any of those meetings, or did any of those negotiations result in the execution of a new contract between your company and the United Mine Workers of America?

A. No, sir.

Q. The last direct conversation, which I understand that

you had with Mr. Ridings, then, was at the meeting here in Chattanooga?

A. How far forward from March 15th of 1960 are
338 you speaking of; Up to the present time?

Q. Yes. Have you had recent meetings with Mr. Ridings?

A. Well, you see, after a year has gone by, in June of '61 I was elected President. I had several meetings with Mr. Tony Boyles, in Washington, Mr. Kennedy, and talked with several of the International officials about the problem, and then about several problems relating to mechanizing, and so forth.

Q. During all of that period of time, whether the meeting was in Palmer, Washington, or where it was, was the topic of discussion the execution of this National Bituminous Wage Agreement of 1958, as amended?

A. Yes, sir. We asked, first if the contract could be amended to fit the economic conditions in this field.

Q. Yes, sir. Now, without going any further, that's real . . .

Mr. Rayson: Your Honor . . .

Q. Let's move off of that subject . . .

Mr. Rayson: asked the witness what period he is talking about, and that is immaterial, we think.

The Court: All right.

Mr. Van Derveer: Let me clear up Mr. Rayson's one question and we'll move on.

Q. Did that deal with the period of time immediately following the cancellation of the contract?

A. It did . . . let me say this; no, it did not.

Q. Do you know the terms of employment between
339 the Grundy Mining Company and Mr. Paul Gibbs?

A. No, sir, I don't. It would be hearsay if I were to say that.

Q. That employment took place, the testimony showed, by phone, I believe, and you weren't . . . how did you receive information about Mr. Gibbs . . .

A. Hearsay.

Q. Yes, sir. Was that relayed to you by whom?

A. Mr. Harwood.

Q. Mr. Harwood. All right, sir. Now, Mr. Callis, were you out in the Gray's Creek area the 15th or 16th of August, 1960?

A. No, sir.

Q. You did not go there either day?

A. No, sir.

Q. So what actually transpired there, of your own personal knowledge, of course you do not know, do you?

A. That's right.

Q. That was the 15th and 16th. Let's move to the following day, which was the 17th. Where were you on the 17th of August, 1960?

A. At the Tracy City office, concerned about being involved in sales, and responsible for sales, concerned about the contracts and shipments of coal, and made arrangements to go to Palmer to the shipping office and the Vice-President in charge of operations office . . .

340 Q. Who was——

A. Mr. Roberts—to discuss what had taken place, and what chances there were for production of a contract at T. V. A.

Q. Do you recall the events that took place on the 17th of August, 1960?

A. Yes, sir.

Q. Where did these events take place?

A. Palmer.

Q. Who was with you at the time?

A. Mr. Allison, the Treasurer.

Q. Treasurer of the company. At that time, you had certain contracts to fill, is that correct?

A. Yes, sir.

Q. Very briefly, Mr. Callis, and without me interrupting you any more often than necessary, tell us what time of the day you went over to Palmer, you and Mr. Allison, and what transpired while you were there?

A. The best I can remember, it was after lunch, arriving at the Palmer office sometime, I'd say around two, calling Mr. Roberts by phone. He came to the office from his house where we discussed what had taken place——

Mr. Kramer: Now, your Honor, we object to this discussion and what transpired there among the officers of this corporation——

Q. Well, Mr. Callis, they object to that. Let's limit
341 this to just exactly what happened, without regard to what was said between any of the parties, whatsoever; just exactly what was said? I mean what was done?

A. When I finished my discussion with Mr. Roberts and said let's go to the store and have a Coca-Cola, we proceeded across from the office to the company commissary. A great number of men had come into town. I went into the commissary store, went through the crowd into the commissary store with Mr. Roberts and Mr. Allison, had a Coca-Cola. After about 20 minutes of passing the time of day I told Mr. Roberts I had to get back——

Mr. Kramer: I object to this your Honor——

Mr. Van Derveer: That's right.

Q. Leave the conversations out and——

A. Left the store, came outside; the group had reached probably 100 or 125 men——

Q. Excuse me. Were there any firearms there?

A. Mr. M. L. Gary jumped upon the platform——

Mr. Kramer: Your Honor, I object to this as being wholly irrelevant and immaterial for any purpose in this lawsuit——

* * * * * * *

342 The Court: I'll overrule the objection.

Q. Mr. Callis, I want to point out to you, for the remainder of this testimony, do not, under any circumstances, relate what someone said to you or what you said to someone else. Now, after you left the commissary there, I believe, and your Coca-Cola, accompanied by Mr. Allison, were you?

A. Yes, sir.

343 Q. What happened to either you or to him?

A. Mr. M. L. Gary——

Q. Just a minute. I don't want you to even use any names on that; just what happened.

A. One of the men grabbed my right arm, underneath on the tender skin, pulled my arm away, I was cursed with the most vile language that I have ever heard, I was told to get out——

Q. Just a minute, now. Do not say anything that was said, see. Not one single word that was said. After this, what did you do and what did Mr. Allison do?

A. I walked through the crowd, where there were guns visible, and got in the car, and as I got in the car a——

Q. Go ahead.

A. ——truck pulled in front of the car; a man got out and put a 30.30 carbine on me as I was getting in the car; we left town normally and cautiously.

Q. When you left, who was with you at the time?

A. Mr. Allison.

Q. When you left, you and Mr. Allison, where did you go?

A. Back to Tracy City.

Q. Can you identify in that mob, that group, excuse me, any of the members of either 7083 or 5881?

A. Yes, sir.

Q. Now, name them. Not what they said; Just name them.

A. Mr. M. L. Gibbs, Mr. Fred Morrison, Clarence McGovern and Mr. M. L. Gary's younger brother, I don't recall his name.

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344 Q. All right, let's put it this way. How long was it before you were able to get any production out of those Gray's Creek Mines? When were they open?

A. Many months, I don't know the exact time.

Q. Now, at the time they were opened, and to a degree this is repetitious, how many mines are there up there, now?

A. Eight.

Q. Yes, sir, but they are in production now, in varying degrees, are they not?

A. Yes, sir.

Q. And how many foremen do you have in that area, there?

A. In excess of fifteen.

Q. Yes, sir. Now, in employing those men, you did not employ Mr. Gibbs, did you?

345 A. No, sir.

Q. Now, in and around that area, I'm speaking now, of course, of 5881, 7083, and that Whitwell area, have you of your own personal observation, seen any checks come to any of the Union officials or Union members, and if so, what were they and where did they come from?

A. Checks that the District was issuing to workers both in the 7083 and the 5881, takes food checks to sustain them through the period when they were not working.

Q. Now, are we talking about the period immediately following August 15th and 16th, 1960? For that area, that time?

A. Yes, sir, it was at that time.

Q. Now, have you actually seen those checks, yourself?

A. Yes, sir. I think I've seen two. Maybe not the checks, but they issued a order that they could go to the store, that I seen. I heard that they were cashed.

Q. Now, these orders came from where? Do you know that?

A. District Nineteen.

* * * * * * *

346 Q. Do you know Mr. George Gilbert?

A. Yes, sir.

Q. You've told us that you have had these negotiations with Mr. Gilbert, or negotiations in which Mr. Gilbert participated?

A. He participated.

Q. Now, in addition to that, have you, at any time, ever seen Mr. Gilbert in and around the fields over there?

A. Yes, sir.

Q. Few or many times?

A. Many times.

* * * * * * *

Q. You have certain leases, I believe, with quite a number of people that you do business with, do you not?

A. Yes, sir.

Q. On your lands?

A. Yes, sir.

347 Q. One of those leases, the testimony has heretofore shown, is with Mr. Gibbs and Mr. Sanders?

A. Yes, sir.

Q. Are you familiar with that lease?

A. Yes, sir.

Q. You are familiar with that area over there. Is that lease on good coal lands or border line coal lands?

A. Depends on the pocket of the entire area of southern Tennessee and the three counties. Various people have various opinions of it. First of all, you have deep mines and you have strip mines. I would say that all of the strip above all of the strip mines, which is what you are speaking of as leased, is as good as there is in southern Tennessee. It's not bad. It's just as good as it is. There's some worse.

Q. Are those lands as good as the Gray's Creek mines?

A. As deep.

Q. I see; different type mines.

A. Mr. Van Derveer, the deep veins of the mountain there are over a hundred million years old, according to geologists, and with cover of from four to six hundred feet. That coal is formed up and is a better quality than coal that is close to the surface. Coal close to the surface is oxidized. That is "strip." That is what Mr. Gibbs and Mr. Sanders had in mind, strip coal.

Mr. Van Derveer: I believe that's all.

348 **Cross-Examination,**

By Mr. Rayson:

Q. Is T. V. A. your principle customer for coal down here, Mr. Callis?

A. Yes, sir.

Q. You had a contract with the T. V. A., which took up the major source of your output of coal, as I understand it, that was cancelled in December, 1959, or January, 1960. Is that correct?

A. December 31, '59.

Q. And it was some two weeks after that that you cancelled your contract with the United Mine Workers?

A. Whatever the date was, it was close after that. Yes, sir.

Q. And did this cancellation that you made of the union contract become effective around March, 15, 19 . . .

A. Yes, sir.

Q. When did you next get a T. V. A. contract?

A. We had one running current with that one that was not cancelled.

Q. Was that a contract which was to be fulfilled by your subleased land mines?

A. It was with the Whitwell Coal Corporation, a wholly owned subsidiary of Tennessee Consolidated, a stripping operation.

Q. I see. In other words, you had another contract that your company was fulfilling through a strip mine subsidiary?

A. Yes, sir. The contract was a sister contract to the one that was terminated.

349 Q. I see. And you've continued to fill that contract until when?

A. Until it was filled.

Q. Until it was filled?

A. Yes, sir. It took quite a while, but we filled it.

Q. And that was when?

A. I would have to guess at it, Mr. Rayson, I can't . . .

Q. Well, was it 1961?

A. I believe it took almost until '61 or it was up into '61. I'm not sure.

Q. Whitwell Coal Company was your company; you were President of it then, weren't you?

A. Since June of '61.

Q. You were an officer of it before then, weren't you?

A. Yes, sir. The same officers of Consolidated held the same positions in the Whitwell Coal Corporation.

Q. Now, that company continued to operate under a contract with the United Mine Workers, didn't they?

A. Yes, sir.

Q. All right. You say that Tennessee Consolidated has not had a contract with the United Mine Workers since it cancelled its contract, back in the first of 1960. Is that correct?

A. That's correct.

* * * * * * * *

350 Q. I asked you if your company did not, in the spring of 1961, enter into a contract with the Allen and Garcia Engineering Company?

A. Yes, sir.

Q. As a part of your understanding with Allen and Garcia, is it not true that Allen and Garcia was to operate your Coal Valley Mine, providing you worked out a contract with the United Mine Workers?

A. Yes, sir.

Q. And then did work out a contract with the United Mine Workers?

A. And they signed it.

Q. Allen and Garcia signed it?

A. Yes, sir.

Q. You reimbursed Allen and Garcia for all of its expenses?

351 A. Yes, sir.

Q. And you took its total production of coal?

A. Yes, sir.

Q. This company operated your Coal Valley Mine, the one that you had chucked down in March of 1960?

A. Yes, sir.

Q. And it continued to operate, the Coal Valley Mine, until some time in the summer of 1962?

A. Yes, sir.

Q. Until the Coal Valley Mine shut down in the summer of 1962, you didn't make any effort to start any other mines in the Grundy area, or in the Gray's Creek area. Is that not correct?

A. You said until we shut the Coal Valley down?

Q. That's right.

A. That's correct.

Q. The reason you didn't was that you had all of your equipment tied up in the Coal Valley Mine then?

A. No, sir. That's not the reason. The reason was because there was a jurisdictional battle going on between the two locals of the United Mine Workers, 7083 and 5881, but in any event . . .

Q. Now, Mr. . . .

Mr. Van Derveer: Your Honor, we think this witness should be permitted to answer, may it please the Court . . .

A. And that jurisdictional battle was over what coal miners were going to be permitted to dig the coal in Gray's Creek.

352 Q. In other words, it was a battle between the members of those two local unions, is that what you're telling me?

A. Yes, sir. Yes, sir.

Q. All right. But in any event, Mr. Callis, isn't it true that you did not open up the Gray's Creek Mine or you did not have Allen and Garcia do it until your Coal Valley Mine fell in in 1962?

A. That's correct.

Q. And it was after that that you moved your equipment from the Coal Valley Mine and you started to work right away in the Gray's Creek area?

A. Allen and Garcia did.

Q. Allen and Garcia did at your direction?

A. That's right.

Q. And all of the negotiations that you are talking about with the International Union took place with respect to Allen and Garcia's operation?

A. Yes, sir.

Q. And you helped them to negotiate that?

A. Yes, sir.

Q. And the employees of Local Union 5881, by and large, were employed in that new mine?

A. The members of 5881, who were the employees of the company. The union doesn't pay them.

Q. That's right. And it was the members of 5881
353 that were employed at the new Gray's Creek Mine?

A. Yes, sir.

Q. Now, Mr. Callis, you have told us about the incident that you were involved in on August the 17th in Palmer, as I understand it. Is that where it happened?

A. Yes, sir.

Q. You say that you were in the store and you came out of the store and saw a large number of men gathered and you identified four of them by name, M. L. Gary, Fred Morrison, Clarence McGoggin and Mr. Gray's brother, I believe you said. Is that what you testified?

A. To my best knowledge, it's M. L. Gary's brother. He's a relative of the family—younger. Yes, sir. That's correct.

Q. These men were all employed at Coal Valley. They were Coal Valley coal miners?

A. Yes, sir.

Q. And they were claiming the work in Gray's Creek then, is that right? That's what they were mad about, wasn't it?

A. No, sir. They told me that we were starving them out, which is an expression we use.

Q. Was Mr. Gary a little bit under the influence on that occasion?

A. Very definitely.

Q. I think he sent you some apologies or something . . .

A. That's correct.

354 Q. His wife called you and told you he was sorry?

A. His wife.

Q. Is he still employed? Have you still got him employed?

A. He was employed and resigned of his own accord about two weeks ago.

Q. But then he saw that you bore him no ill will and took him back, I take it?

A. No, sir, I don't harbor ill will.

Q. What about this Fred Morrison? Who was he?

A. Assistant superintendent for Mr. Everett Roberts.

Q. He wasn't participating in the assault, was he?

A. Sir?

Q. He didn't assault you, did he?

A. No, sir.

* * * * * * * *

Q. I'm asking you. Are you saying that your own general superintendent did that to you?

355 A. All I said was he was with the crowd.

Q. I'm asking you if you do say that?

A. No. I don't say that.

Q. You say you saw two checks, which you understand were given to buy groceries for some of the coal miners, were given to them by District 19. Do you recall when you saw those checks? Can you pinpoint that date?

A. How close do you want to pin that down?

Q. Let me ask you this: Wasn't that in November or December of 1961, Mr. Callis? Does that sound about right to you?

A. I can't remember the exact time, Mr. Rayson.

Q. Did you lease this strip mine land to Mr. Gibbs and

that other fellow after your Whitwell Coal Company stopped stripping?

A. Some time after.

Q. Was it the same land?

A. Oh, no.

Q. But it was after you stopped stripping operations with your own company?

A. Yes, sir.

Q. And it was after that that you leased this strip mine land to Mr. Gibbs and Mr. Sanders?

A. Yes, sir.

Q. Can you tell us how this new mine of yours in the Dogwood Flats area or Gray's Creek area compares from a mechanization standpoint with the other mines
356 here in this part of the country?

A. Are you speaking of the big mines?

Q. Yes, sir.

A. It's the—of course, you asked of the present company, it's the most modern mine in Tennessee, as far as I'm concerned. The equipment is the most up-to-date. We're having quite a bit of trouble finding qualified people to man the equipment.

Q. Does it take skilled people to run it?

A. Very definitely.

Q. Does it take skilled people to manage it?

A. Sir?

Q. Does it take skilled people to manage this equipment?

A. It certainly does. I had to discharge one that didn't pan out yesterday.

* * * * * * *

357 Q. How much, just roughly, is the investment in——

A. I couldn't give you the exact dollar, but I can give you a pretty fair guess. To equip a mine of this type it would run about $30,000.00 per man——

Q. And how many men would you——

A. This is a varying factor. We haven't fully equipped it yet. We're preparing to add another unit. Those units cost $150,000.00 apiece; we have two units in the mine now, and are preparing to put a third one in. The active equipment represents approximately 50 per cent of the total, overall underground investment, and then you have the developmental cost from the outside, erection shops, and so forth, so it will knock a pretty big million dollar bill in the hole; put a big hole in it.

Q. This mine, of course, replaced your Coal Valley Mine?

A. Yes, sir.

Q. In the broad sense?

A. Yes.

Q. Is it not true that the mines that Mr. Gibbs was to open in 1960 were five mines with eight employees each? Was that not the schedule that your company had worked out?

358 A. It could have happened one of two ways; it could have been five mines, or it could have been two mines.

Q. Well, let me ask this. Was that not your plan when Mr. Gibbs was engaged?

A. It was a double plan; it depended on what happened, and how the men reacted whether we were successful or not. The basic plan was to install two mines to produce approximately 600 tons in each, per day, double shifting, the idea being to install two CLR loaders to five Twelve cutting machines, two—61 AM Fan conveyers, and our 30 inch conveyer belt line, and the proper bin arrangements on the outside.

Q. You testified previously on the pre-trial deposition of this case, and I believe you explained in that deposition that you didn't know then whether or not you would

run these mines for your own account, or whether or not you would lease them out to an individual operator?

A. They were to be leased out after they were successfully in production because the company was unable to conduct business with the union up there, in dealing with the men, whereas individuals seem to be able to get men to work for six, eight, or ten dollars a day cheaper then we could.

Q. In any event, you didn't know how long Mr. Gibbs would actually be on your payroll? You didn't know how long it would take you to get them into production?

A. Do you mean on salary?

359 Q. Yes.

A. No. On salary I don't know, but now on lease, it would have been for the full extraction of the tonnage that was allocated to the mine.

Q. As of August 15th, you didn't know how long it would take you to get those mines in production, did you?

A. No, sir.

Q. It might have been a month, or it might have been two months?

A. Well, you see, in building a mine, Mr. Rayson, it takes developmental time. You don't fully develop the mine until you've penetrated your entries, developed your cross entries to get into room work, before you realize full production.

Q. Yes, sir.

A. We're still in developmental stage with this mine, yet it has been producing two or three months. We won't reach full production from our room work on the cross entries on this Gray's Creek Number eleven mine, until probably after the first of the year.

Q. Are you speaking of your large mechanized mine, now?

A. Yes, sir. And the same thing is true of a small mine; you must develop your entries to create room work.

Q. I'm asking you this because I certainly don't know. Is it not true that it would take less time to develop one of the smaller mines to its potential than it would a larger mine?

360 A. Yes, sir. The size of the mines directly purport to the development time.

Q. Is it not reasonable to estimate that something on the order of a month or two months is about the normal time to open one of these smaller mines and get it to its production?

A. Not the type mine that was intended by the operations department for Mr. Gibbs.

Q. Would you say two and a half or three months?

A. It would take, in my opinion, somewhere between six months and a year to get it into full production, to get the two of them. Of course they're both the same type.

Q. But depending on what happened during this interval, you say then is when your company would decide whether or not to lease out these mines?

A. No. We were going from the beginning, to definitely let Mr. Gibbs have a lease, but to aid the developmental cost, the company was spending money, and hired Mr. Gibbs to develop the mine, to put the mine in, and get it up into development, because I'm sure that Mr. Gibbs does not have the kind of money that it would take to put a mine in, but to get his manpower, and develop the mine, and get it into production. Then, once it was done, we would then in turn lease the mine to him. He had the lease, but he was on salary until he reached production.

Q. Then you don't know just exactly how long it would take to reach production on those mines?

361 A. It would be a guess.

Q. Just a guess?

A. Yes, sir.

Q. Of course, your agreement with Mr. Gibbs, you could change it at any time you wanted to; you didn't have any commitment with him as to how long he was to stay on salary, or anything else, is that correct?

A. No, sir. That was Mr. Harwood.

Q. You didn't know Mr. Gibbs before that, did you?

A. Yes, sir. I've known Mr. Gibbs since 1946.

Q. You hadn't met him before that?

A. No; October of '46.

Q. Who was your operating man in 1960? Who was the head of your operation?

A. State that again.

Q. Who was the head of your operations down here, in 1960?

A. Mr. Everett Roberts.

Q. He was the man who would make these kind of decisions?

A. He and Mr. Hampton. As I mentioned to you on the deposition, the most decisions were group decisions, but Mr. Hampton, being President, and Mr. Roberts being Vice-President, they were the final say on operations.

Q. Mr. Hampton stayed in Nashville, and Mr. Roberts stayed here, in this area——

A. Palmer.

362 Q. Palmer. Does he still live there?

A. Yes, sir. He lives in Palmer.

* * * * * * *

363 **WILLIAM B. ALLISON,**

having first been duly sworn, testifies as follows:

364 **Direct Examination,**

By Mr. Van Derveer:

Q. Will you state your name, please, sir.

A. William B. Allison.

Q. And by whom are you employed, Mr. Allison?

A. Tennessee Consolidated Coal Company.

Q. In what capacity?

A. Treasurer.

Q. Now, let's go back to the 15th and 16th of August, 1960. At that time, by whom were you employed?

A. Tennessee Consolidated Coal Company.

Q. In what capacity?

A. I was not an officer of the corporation at that time. I was new with the company and just had come with it a few months prior.

Q. What position, if any, did you hold with the Grundy Mining Company?

A. None, whatsoever.

Q. Now, on those dates, or immediately prior to it, where was your office, or where were you actually located?

A. Tracy City, Tennessee.

Q. In the offices of the Tennessee Consolidated Coal Company, I believe?

A. That is correct.

Q. Now, do you know of your own knowledge, any-
365 thing at all about the events that took place out in the Dogwood Flat area the 15th and 16th of August, 1960?

A. No, sir. I was not present there. I cannot give of my own knowledge.

Q. Yes. Now, on the 17th of August, that is, the day following, which I believe was on Wednesday, were you in the Palmer area?

A. Either the 17th or the 18th.

Q. Yes, sir.

A. It could be verified.

Q. Now, who, if anyone, was with you at that time?

A. Paul Callis.

* * * * * * * *

Q. And do I understand you correctly, sir, to say that the two of you were there in Palmer?

A. That's correct.

Q. Now, Mr. Allison, without—and I want to caution you to be extremely careful—do not relate anything whatsoever that was said to either you or to Mr. Callis that day—nothing that was said—but in your own words, briefly but completely, tell us what happened when you arrived at Palmer that day?

Mr. Kramer: Your honor, if it please the Court, this is evidence similar to what your honor heard yes-
366 terday—the same objection without going into detail——

The Court: All right. Overrule the objection.

* * * * * * * *

A. We arrived in Palmer some time shortly after lunch. I wouldn't be exact on it—I'd say one to two o'clock, along in that neighborhood. After certain conferences and business discussions in the Palmer office, we proceeded to go to the commissary before leaving Palmer. On going to the commissary, we went through a rough crowd of men and into the commissary in the company of one other person. We discussed normal discussions within the commissary, and on leaving, when we came out, the mob was considerably larger.

Q. Were there any firearms present?

A. There was later.

Q. Yes, sir. Go ahead, sir.

A. At that time Mr. Callis was grabbed by the arm
367 under here. Conversation ensued. I turned and put my back to Mr. Callis' back as a matter of protection to both of us. And due to the attitude of the mob, the things that occurred, it was best for us to leave, and leave promptly. I'm trying to leave conversation out, that's why it's hard——

Q. That's all right. Go ahead.

A. So we left, proceeded to get into my automobile, and I was driving. A panel truck drove up and attempted to block us from backing out. Then it pulled to the side to attempt to block us if we got out. They began to jump out of that, the men did. I very calmly backed the car between the back bumper of the panel truck and the curb, back out into the street like, turned and started to leave promptly. As we started to leave, two cars of young men pulled in side by side, taking each lane of the road, as we started over the railroad track and up the hill, which did not allow us to pass and we drove at about 10 miles or 15 miles per hour. We calmly drove behind them and after we got over the hill, one proceeded to turn off. The other one we did not attempt to pass until we got clear of all bridges, where if anybody cut into us, we had shoulder to take it off on. At that point we passed them and proceeded at full speed back to Tracy City.

Q. Now was there much or little violent or filthy language used that day?

A. What was used was violent and filthy.

368 Q. All right, sir. Did you recognize in the—you defined crowd or group or mob—any of the people that were there?

A. Yes, sir. I did.

* * * * * * *

Q. Who were those, sir?

A. There was Marvin Lee Guerry; there was Chief Guerry—Chief is a nickname.

Q. Yes, sir.

A. And there was Fred Morrison. There was a Guerry boy, whose first name I cannot call.

Q. Yes, sir.

A. And there was Clarence McGovern.

Q. Yes, sir.

A. And I wouldn't attempt to try to name in the excitement any other names, no more familiar than I was——

Q. Were any firearms drawn upon either you or Mr. Callis?

A. There was a firearm taken from the panel truck.

Q. All right, sir.

369 A. Now, I didn't watch it any farther at the time, after it was taken, because I had one job and that was to concentrate on getting through 6 inches and out of there.

Q. So——

A. I just turned my head from it, turned to the back, and backed right out.

Q. All right. Now, I believe you said you went on back to Tracy, did you not?

A. Yes, sir.

Q. You and Mr. Callis. Now, the night of the 16th, which I believe, Mr. Allison, was the day of the night before the events that you've just testified about, did you see Mr. Paul Gibbs?

A. Yes, sir, I did.

Q. Where?

A. I saw him all night long, just about.

Q. Were you with him most of the night?

A. A bigger part of it.

Q. And who was with you, other than Mr. Gibbs?

A. Mr. Paul Callis and Mr. Houston Beaumont.

Q. The three of you with Mr. Gibbs?

A. Yes, sir.

Q. Where did the four of you spend that night?

Mr. Kramer: Now, your honor, we object to that—as I recall the objection was sustained——

370 Mr. Van Derveer: I believe that certainly an objection was sustained to certain opinions as to why they were together, but as to what they actually did, I don't recall the Court . . .

The Court: Overrule the objection at this time.

Q. Now, here again, Mr. Allison, I do not want you to relate anything at all that was said, even between any of you or anyone else, but limit your testimony to exactly what you saw. What time of the evening of the 16th did you meet Mr. Gibbs?

A. To recall the exact time, it was after the dinner hour —I'd say along the neighborhood of 6, 7-7:30—along in there.

Q. And how long did the three of you stay with Mr. Gibbs that night?

A. We met Mr. Gibbs in Monteagle.

Q. All right. And how long did you stay with him that night?

A. Off and on, we stayed with him all night.

Q. All right, sir. And what time the following morning was it that you left Mr. Gibbs or Mr. Gibbs left you?

A. I would say in the neighborhood of 6 o'clock.

Q. 6 o'clock the following morning?

A. Yes, sir.

* * * * * * * *

371 Q. Now, Mr. Allison, there's an allegation in this original petition that the Grundy Mining Company did have a ready market for its coal, specifically a con-

tract for the delivery of certain coal to the United States Navy. Is that true?

A. Grundy Mining Company was the producer on a contract bid by Tennessee Consolidated Coal Company to supply approximately 35,000 tons of coal to Redstone Arsenal.

* * * * * * *

372 Q. Now, Mr. Allison, is the Gray's Creek area mine, or is the Gray's Creek Mine or the Grundy Mine there in operation today?

A. Yes, sir.

Q. It is in active production today, is it?

A. Yes, sir.

Q. And how many different—whether you call them foremen or superintendents or so forth—does the company have in that immediate area?

A. We have 10 in addition to the large mine.

Q. Yes, sir.

A. Now, there are one or two of those mines that are in strictly preliminary stages and may not be moving as yet.

Q. In the process of being opened? Did you, when you opened these mines, after the period of time that they were closed, or kept from being opened, did you employe Mr. Gibbs?

373 A. No, sir.

Q. Although you did employ—or your company did employ—others in the same or similar capacity?

A. Yes, sir.

Q. On these mines—or in these mines—without going into details of each particular classification, but in what you refer to as the big mine, and if there's any difference what will be referred to as the small mine, what is the daily pay scale that you are paying there?

A. Well, to take a rough average, in the big mine, it's about $26.00 a day, or $130.00 a week.

Q. Now is that on a single shift?

A. That's on a single shift.

Q. $130.00 a week?

A. Yes.

Q. Now, if—or are these mines working any of them on a double shift?

A. Yes, sir. They're working different men on the second shift.

Q. I see. Now, of course, the different classifications there—some make more, some less, is that. . . .?

A. There is a variation between a machine operator, cutting machine operator, or loader, shuttle car operator, they're paid per scale for their job classification. There's not a great variation in them, but there's a little according to skill.

374 Q. But then am I correct in saying that what you would define as the mean pay—the average pay—that's roughly $26.00 per day?

A. That's what I'm thinking of, yes, sir. Just an average.

Q. We have nothing further of this witness.

Cross-Examination,

By Mr. Rayson:

Q. Mr. Allison, you have told the jury about a group of men that you referred to as a mob, that you saw around the 17th or 18th of August in Palmer. And you've identified 4 men amongst them: M. L. Guerry, Chief Guerry, Fred Morrison, and Clarence McGovern. Is that correct?

A. That's correct.

* * * * * * *

Q. Now, Guerry was then employed at your—or
375 then had been employed at your Coal Valley Mine, was he not?

A. That is correct, sir.

Q. And he was the one who grabbed you by the arm, wasn't he? Or grabbed Mr. Callis?

A. Grabbed Mr. Callis.

Q. By the arm. Was he under the influence at that time?

A. I would think he was.

Q. And is he the one who spoke rather harshly to you?

A. He spoke rather harshly to Mr. Callis when I turned my back around to Mr. Callis. Then the one that spoke directly harshly to me was his brother. The big Chief is his brother.

Q. Yes. Was he an employee of your company, too?

A. He was a previous employee, yes.

Q. Now, did Mrs. Guerry, or one of those people, later call you on the telephone and apologize?

A. Not to me, sir.

Q. Did they convey some apology to you?

A. Chief gave—conveyed an apology to me.

Q. Yes, sir. And these Guerrys were rehired by your company?

A. Yes, sir.

Q. Now, Fred Morrison——

A. Excuse me, Chief Guerry was not rehired at the time, because there was not anything that he could qualify for.

Q. I see.

376 A. That was the only reason. Marvin Lee, the one who grabbed hold of Mr. Callis, was reemployed.

Q. Yes, sir. Now you say Fred Morrison was a part of that mob, too?

A. He was in it, standing there.

Q. Have a gun?

A. If he did, I couldn't see it.

Q. Now, Fred Morrison is not a member of the United Mine Workers?

A. No, sir, he is not.

Q. He's your general superintendent, isn't he?

A. He was at that time, but he's never been since then.

Q. He's your—he has a lease from you people now, and is working on a lease, isn't he?

A. Yes, sir, he's an independent operator.

Q. Yes. How long were you there in that yard that day in front of the store?

A. At a time like that, it's hard to judge time.

Q. 10 minutes?

A. So I ask you to forgive me if I'm wrong. 10 minutes would be very good.

Q. How many men would you say were there?

A. By the time we got away, I'd say there was 75 to a 100.

Q. But you left after about 10 minutes?

A. Yes, sir.

377 Q. Now, Mr. Allison, you talked about your large mine on Gray's Creek?

A. Yes, sir.

Q. That's the m[illegible] where you're paying your men approximately $26.00 a day?

A. Yes, sir.

Q. Is that correct?

A. Some more, some less.

Q. Those men are members of the United Mine Workers Union?

A. To my knowledge, I think all of them are members of the United Mine Workers. Now, they could or could not be, accordingly. I can't verify it, but I'd say the majority of them are.

Q. Now, you're not saying that you pay that scale in the other mines that you have there, are you?

A. The other mines are not highly mechanized.

Q. No.

A. They will make from—a little better than a $100.00 a week . . . better than 20 dollars a day.

Q. They make right at $20.12 a day.

A. $20.12. Last week I think most of the men in those mines made around $130.00. They worked on Saturday.

Q. All right, sir. And in fact you hire a foreman in those mines—in your non-mechanized mines—for $25.00 a day, don't you?

A. That's correct, sir.

Q. So you're actually paying the foreman in those
378 mines less than you're paying the coal miners in the other one?

A. That's correct, sir.

* * * * * * * *

The Court: Just a moment. Mr. Allison, did you at the time of the incident there at the commissary, did you know Mr. George Gilbert?

A. No, sir. I didn't.

The Court Did you know any members of the District 19, at that time, or did you see or recognize any of those members there?

A. No, sir. And I don't think I'd met any of them at that time.

The Court: All right.

(Allison excused.)

Mr. Kramer: Your Honor, I renew my motion to strike this evidence with reference to the occurrence over there——

The Court: I believe the motion to strike should be overruled.

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414 **JIM CAMPBELL,**

having first been duly sworn, testifies as follows:

Direct Examination,

By Mr. Van Derveer:

Q. Will you state your name please, sir?

A. Jim Campbell.

Q. Where do you live, Mr. Campbell?

A. Tracy City.

Q. And how long have you lived there?

A. All my lifetime.

Q. And what age man are you?

A. 48.

Q. Have you ever worked in or around the mines in that area?

A. Ever since I've been big enough to work, that is all I have ever done.

Q. Now, what type or kind of work did you or have you done over there over the years?

A. Mining coal and hauling coal.

Q. Have you—are you an operator over there?

A. Yes.

Q. Do you run a mine now?

A. Yes.

Q. And where is your mine?

A. It is Tepco property.

415 Q. Now, you have used the word Tepco, meaning what?

A. Tennessee Products and Chemical Corporation.

* * * * * * * *

Q. How long have you known Mr. Gilbert?

A. Several years, I'd say since 1953 or '54.

Q. Now, who is this Mr. Gilbert?

A. He is field representative for the UMW.

Q. Do you know Mr. Paul Gibbs, the plaintiff in this case?

A. Yes.

Q. How long have you known Mr. Gibbs?

A. Well, a long time, 25 years.

416 Q. Now, Mr. Campbell, and I direct these next few questions now to that period of time, the 15th, 16th, 17th of August, 1960. Did you see Mr. George Gilbert on either of those days?

A. I seen him about the 17th.

Q. And where were you when you saw him?

A. At his home.

Q. What was the occasion for you going there?

A. Well, I went down to have a talk with him about something that had happened.

Q. All right, sir. And who, if anyone, was present there other than you and Mr. Gilbert?

A. Just me and Mr. Gilbert.

Q. And I believe you have told us it was at his home. Can you fix the time of day the best you can?

A. It was in the afternoon.

Q. All right. And while there, did Mr. Gilbert make certain statements pertaining to or relating to Mr. Paul Gibbs?

A. Yes.

Q. What statements were those that he made?

A. Well, he said Paul was trying to bring the Southern Labor Union into the coal fields.

* * * * * * *

417 Q. What if anything did Mr. Gilbert say further in that regard?

A. Well, he said the union wouldn't let him do it.

Q. What further if anything did Mr. Gilbert say?

A. Well, he said they had ways of preventing him from doing it.

Q. What further if anything did Mr. Gilbert say about or relating to Mr. Gibbs?

A. That's about all. He talked about what had happened down at Gray's Creek, and he seemed to think Gibbs was going to have to go.

Q. What statements, what further statements if any, did Mr. Gilbert make about the ways and means that—by which Mr. Gibbs had to go?

A. He said he had friends in high places that could move him out from the mining business.

Mr. Van Derveer: You may ask him.

Cross-Examination,

By Mr. Rayson:

Q. You related this conversation to Mr. Gibbs, I take it?

A. Sir?

Q. You related this conversation that you had with Mr. Gilbert to Mr. Gibbs?

418 A. Well, I don't remember it, I must have talked it somewhere, I'm here as a witness.

Q. You talked to Mr. Gibbs about this?

A. Yes, I talked to Mr. Gibbs about it.

* * * * * * * *

419 Q. Well, you have told Mr. Gibbs, I take it, about this?

A. I might have.

Q. Now, I'm asking you about Mr. Gibbs. Weren't you and he in business together some way?

A. No, we had a contract through Tennessee Products at the cement plant. I put in half of it and Mr. Gibbs put half.

Q. I see. And that was the contract that was cancelled because of the high ash, wasn't it?

A. Well, I don't know exactly why.

Q. Well, that is what they told you, wasn't it?

A. The contract was never cancelled.

Q. Well, did you haul any more coal to the cement . . .

A. Still hauling the coal.

Q. You are. Do you have a mine now?

A. Yes.

Q. Where is your mine located?

A. Daus.

Q. In Daus?

A. That's right.

Q. You had this conversation with Mr. Gilbert in
420 Mr. Gilbert's home, is that right?

A. Yes.

* * * * * * *

421 **PAUL GIBBS,**

recalled.

Redirect Examination,

By Mr. Van Derveer:

Q. Mr. Gibbs, there has been introduced into evidence here and identified as the plaintiff's exhibit number 33, what reports to be a recap of your business activities in your Products mine for the week ending August 12, 1960. I'm going to hand you this, and then I would like to ask you several questions about it, sir. And you may also refer to your ledger book, if you so desire.

Mr. Kramer: In order that there be no question, your Honor, you have our objection to this, I guess we'll make it at this time.

The Court: Yes, and the objection is overruled.

Q. Mr. Gibbs, what is this Exhibit 33? What does it report to show?

A. That's the full payouts and the gross receipts for the week ending August 12, 1960.

Q. Now speak out just a little louder. Now where are these figures taken from?

A. From this 1960 ledger.

Q. All right, sir. Now are these figures estimates then, or are they actual figures taken from your ledger sheet?

A. They are actual figures taken from my——

Q. Now, the ledger sheets—Do you know of your own knowledge that those are the true and correct
422 amounts that are listed therein?

A. I keep my own ledger book, yes, sir.

Q. All right, sir. Now referring to the week ending that period of time, you showed that you would have taken in, and some of this is the two products mine, for that week $2089.46. Is that correct?

A. 48 cents.

Q. 48 cents. At that time, how much were you selling this coal for?

A. $4.05 a ton.

Q. Now, to whom were you selling it?

A. Tennessee Products.

Q. All right. Now, you show here, coal loaded 318.28 tons. How did you arrive at that figure?

A. We weighed my cars at different times; even the union has had them weighed, and they average 1600 pounds. . . .

Q. Then, is that an actual figure there?

A. Yes, sir.

Q. Now, in addition to that, you have coal purchased—197.64 tons. What do you mean when you say—explain that figure?

A. The second mine was operated on a tonnage basis, and I paid the fellow $2.00 per ton put in the. . . .

Q. All right, sir. Then the total tonnage produced for

those two mines for that week was what? The total ton.

423 A. 515.92.

Q. And you multiplied that times the 4.05 that you sold it for for the gross figure of $2089.48, is that correct?

A. Yes, sir.

Q. Now let's take your expenses, that is, what it cost you to produce that coal, item by item, as we go along. First you have loading labor, and you have the name James Ruben Short, $87.15. What was that?

A. That was for loading coal in a month.

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424 Q. All right. The total that you paid out to this group amounted to what?

A. This group of coal loaders was $509.25.

Q. All right. Then you have other labor. Now what do you mean there when you say there other labor?

A. Two of the other fellows was running the motor, pulling the coal, and keeping the tracks next to the. . . .

• • • • • • • •

425 Q. Now you have further costs down here—workman's compensation insurance—515.92 tons times 27 cents a ton. By what reason is it that you use a tonnage figure rather than a state approved rate per $100.00 a payroll?

A. Well, on that tonnage basis, that was worked out to cover the truck drivers as well as the men who worked underground.

Q. And was computed on a tonnage basis?

A. Yes, sir.

Q. All right. Now, the 27 cents per ton meant that that week you paid how much for workman's compensation insurance?

A. $139.30.

Q. Now your payroll taxes amount to what and was computed on what basis?

A. That was computed on a 3% Social Security and involved on-a-Unemployment.

Q. So that the total there was 6⅛% of your total payroll?

A. Yes, sir.

Q. Which amounted to how much?

A. $46.23.

Q. Now, thereafter, Mr. Gibbs, you have certain items listed. Let's go through each of them, and I'll ask you for an explanation of them in their entirety. Gasoline, 25% of $1120.00 amounting to what?

A. $280.00.

Q. And your oil and grease, 25% of $48.00 amounting to?

426 A. $12.00.

Q. Tires and tubes, 25% of $153.84 amounting to?

A. $38.46.

Q. And truck repair, 25% of $222.87?

A. $55.71.

Q. And truck insurance, 25% of $37.65?

A. $9.41.

Q. And your truck tags, 25% of $41.04?

A. $10.26.

Q. And depreciation, 25% of $422.08.

A. $105.20.

Q. Now how did you compute this, and what do you mean by the 25% of those figures?

A. That's a 25% of 8 trucks.

Q. And on this you——

A. I used 2.

Q. All right, sir. And you have heretofore testified in

this case the same figures on the 8, is that correct? All right, then, your total expense there, other than your labor, amounted to what?

A. $1451.32.

Q. So for those 2 mines, what you made, or would have had left, in fact had left, amounted to what for that one week?

A. $638.16.

Q. $600—I'll pass this and let the jury see this, please. Now, Mr. Gibbs, we picked out or you picked out in a one week—that is, the week ending August 12, 1960. Is what you made here, this particular week, in these two mines, an average of what you made each week in those mines?

427

A. Yes, sir. It is.

Q. Now how long, and in advantage to the defendant and so the jury will understand it, wasn't it some period of time after that that one of these mines, what do you call it, worked out?

A. Yes, sir.

Q. Do you recall when that was?

A. To the best of my knowledge, it was either in October of November of '61.

Q. Of '61?

A. Yes, sir.

Q. Now that was the mine that was worked out?

A. Yes, sir.

Q. Which then left you with the one remaining mine? Is that correct?

A. No, I had 2 over at Whitwell, the 74 and the 75 mine.

Q. And then those are the leases that were cancelled off?

A. That's right. That's correct.

Q. Now on that phase, we have nothing further on that

particular point, if it please the Court. We do on the other after lunch.

The Court: All right.

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428 **PAUL GIBBS**, Recalled

Redirect Examination,

By Mr. Van Derveer:

Q. Mr. Gibbs, heretofore, it has been testified in this case, that the Grundy Mining Company had a certain contract with the, I believe the United States Navy, calling for 35,000 tons of coal. Based upon that assumption and during the noon hour, did you—working with us—prepare certain schedules relating to that? Now, I'm going to hand you a copy of this, see if you can identify, sir.

* * * * * * * *

Q. Now, Mr. Gibbs, I'll ask you if you will hand the copy that you hold to the reporter, and ask the reporter to mark it as the proper exhibit. Now, using as a
429 base figure the 35,000 tons, these figures are based upon the delivery of how many tons per week?

A. 10,000.

Q. Or a five day work week with a delivery each day of—how many tons?

A. 2000 tons.

Q. For a total time within which to deliver the coal for that contract then amounting to 3½ weeks?

A. That's right.

Q. Now, I believe that there's testimony in the record that the agreed price there was 78¢ per ton. Is that correct?

A. That's correct.

Q. So the gross amount that would be received by you on the 35,000 tons on that period of time is what figure?

A. $27,300.00.

Q. Now in order to convey or haul this coal, there are certain expenses that have been—that are listed on this exhibit. And I'll ask you, sir, if will take those one by one by one and explain them to the jury. What figure do you have for labor?

A. $5633.60.

Q. Which is based upon what?

A. 8 men on 2 shifts a day, $20.12 a day.

Q. Then for all of this, of course, for the 3½ week period?

A. Yes, sir.

Q. And then your gasoline amounts to what figure
430 and how is that computed?

A. That's on a 3½ week basis.

Q. Based upon the mileage and so forth that you have heretofore testified to in this case?

A. That's correct.

Q. Would you think it would cost you what?

A. $3,940.00.

Q. And your oil and grease, the same basis with the item for it?

A. Would be $168.00.

Q. And your tires and tubes?

A. $538.44.

Q. And your truck repairs?

A. $780.05.

Q. And at that time I believe that on your workman's compensation, you were paying the standard state rate per $100.00 a payroll of $2.00, were you not?

A. That's right.

Q. So your workman's compensation insurance premium would be what?

A. $112.67.

Q. Your truck insurance?

A. $131.78.

Q. Your payroll taxes?

A. $345.06.

431 Q. Your truck tags, the proportionate part for the 3½ weeks?

A. $143.64.

Q. And the increased amount of telephone estimate?

A. $20.12.

Q. The depreciation on your equipment for that 3½ week period?

A. $1,477.28.

Q. For a total expense of how much, leaving a net profit of how much?

A. $13,270.72, leaving a balance profit of $14,429.28.

Q. Now, of course, Mr. Gibbs, that was only for the 3½ weeks period, which in your opinion it would have taken to have fulfilled the 35,000 ton contract, is that correct?

A. That's correct.

Recross Examination,

By Mr. Rayson:

Q. Mr. Gibbs, you have introduced two exhibits on what you say you were damaged. One, exhibit No. 33 pertaining to your mines on Tennessee Products lands, and the other one, exhibit No. 34 which pertains to the haulage from the Gray's Creek Mine. Now I want to talk about exhibit No. 33 first—the one where you say for the week ending August 12, 1960, you made $638.16. Now did you figure this out yourself?

A. No, sir. I did not.

Q. Did you not take this from the record?

432 A. I took them from my records today, yes, sir.

Q. Did you do it, did you do it yourself?

A. No, sir.

Q. Did you check it against your records?

A. I was sitting there present.

Q. Well, did you actually check it against them?

A. No, I didn't.

Q. Did you have any independent record of the receipt of $2089.48 for that week?

A. Did I have any receipt?

Q. Did you have any record of that figure?

A. Nothing more than what's in my ledger.

Q. Do you claim that that figure is in your ledger?

A. No, I don't claim that that figure is in my ledger.

Q. You calculated that figure?

A. I took the price of the coal, Mr. Rayson, of what I was receiving for it and what I had paid out against the coal, and my other expenses and that's what I had left.

Q. Does this exhibit pertain to all of your mines?

A. Yes.

Q. All of your mines on Tennessee Products lands?

A. That's right.

Q. Then you say that it is a typical exhibit, or a typical week?

A. It's an average week, yes, sir.

433 Q. Average week. How long have you been in this business?

A. What do you mean?

Q. How long had you been in the business of the type that appears on this exhibit, running these little mines?

A. Well, I've been trucking and mining together with them both combined since October, 1939.

Q. And you had been running this particular mine since 19—certainly in 1957 and 1958 and 1959, hadn't you?

A. That's right.

Q. Or rather these several mines that this exhibit covers, you had more than one during this period?

A. That's correct.

Q. Now, isn't it a fact, Mr. Gibbs, that in those same years in which you say that a typical week would have netted you $636.16, that you had this income experience: in 1956 you lost $2658.00, is that correct?

A. I dont know the figure, no, sir.

Q. If I can find the income tax returns, your honor.

A. I'm not any tax man. I don't keep up with that.

Q. Well, you know whether you made or lost money, don't you?

A. I lived, I can say that.

Q. Here—we'll take the 3 years just before you say that this week became typical. I'm going through your income tax return which your company has produced in this case, and ask you how much you made in 1957?

434 Mr. Van Derveer: Mr. Rayson, let's get the number of the exhibit for the record.

Mr. Rayson: This is exhibit 16.

Mr. Gibbs: Listen, Mr. Rayson, I dont know anything about these returns.

Q. It appears that your counsel has written a figure in the upper left hand corner. Would you read that figure to the jury?

A. $2658.41.

Q. And I believe the word loss is written above it.

A. It is.

Q. Your Honor, I'd like to pass to the jury the reproduction of this return, however, it's so faint, I'm afraid they won't be able to see too much about it. May I say that the profit and loss is on the inside sheet, and that would be the one that pertains to this loss. All right, sir. Now, I'm going to refer to your exhibit, Plaintiff's Exhibit # 17 for the year 1958. Now what sort of year did you have that year?

A. I lost $23,476.87.

Q. You lost $23,476.87. I'd like to pass this to the jury also. Now in 1959, I notice that you made a profit. Will you tell us what that profit was?

A. $577.64.

Q. $577.64. That's exhibit 18. I leave that here with the jury. Now you were engaged in the hauling as well as the mining business at time, weren't you?

435 A. Yes, sir.

Q. And in fact in 1959, Mr. Gibbs, you bought 6 trucks to handle a job that you had obtained, namely the Pikeville Coal Company job, didn't you?

A. That's correct.

Q. And you used those 6 trucks on that job, didn't you?

A. Part of the time, yes, sir.

Q. You entered into a contract for that job, didn't you?

A. Yes, sir.

Q. A written contract?

A. That's right.

Q. You were to be paid under that contract 85¢ a ton for delivery to the Whitwell ramp from a certain area in Floyd Hollow, 65¢ for another run to the Whitwell ramp from Griffith's Creek, 80¢ to that ramp from Kelly's Creek and Griffith's Creek, and 75¢ to the Daw's ramp from the area between Kelly's Creek and Woodcock Gulch, isn't that right?

A. That's right.

Q. You were paid about the same amount that you say you were going to be paid under this Grundy contract?

A. On the average, close to——

Q. On the average. And you were using the same trucks on that contract that you said you would use over on the Grundy contract?

A. That's correct.

436 Q. And you were doing that in 1959 wh[illegible] made from the entire year, both from your trucking operation and your hauling operation, $577.00, is that correct?

A. That's correct.

Q. Incidentally, the contract that you had to haul Pikeville Coal Company coal bound you to haul that coal until Pikeville's contract ran out, didn't it?

A. Not with my own trucks, no, sir.

Q. I'll ask you if you didn't agree to this in that contract, Mr. Gibbs: Second party, that's you, agrees that at all times during the life of this contract, he will keep, own or possess for use a sufficient number of trucks and drivers to haul and deliver all coal mined and produced at the various sites or points of operation of said Pikeville Coal Company?

A. That's absolutely correct.

Q. And that's what you did?

A. I most certainly did.

Q. And you continued—you used the same trucks there in the fall of the year—the same trucks that you say you would have hauled coal from—and now I refer to the coal that you say you would haul under exhibit 34—You used the trucks that you were going to haul coal from there under this contract which required you to have the trucks then at the Pikesville Coal Company job?

437 A. That's correct, and it doesn't say anything in that contract of what time we was down, either, Mr. Hayson.

Q. True, there's always down time in any of these contracts, isn't there?

A. It's excluded, yes.

Q. Now, of course, the amount of coal that you could

produce from these Grundy Mines would depend somewhat on the kind of equipment that you would have at that mine, wouldn't it?

A. That's right.

Q. If you had modern equipment you could produce a good bit, and if you had a pick and shovel you wouldn't do so well, would you?

A. Be less production, sure.

Q. Yes. What sort of equipment did you have in your mines over in Tennessee Products lands?

A. I had a battery locomotive, electric drill, hand motor.

Q. Hand loaded?

A. Yes, sir.

Q. In other words, the men picked up the coal in their hands and put it on——

A. No, it's not that simple. You use a shovel.

Q. You use a shovel. What sort of an investment do you have in a mine like that? How much does a motor cost?

A. To the best of my knowledge, I think I paid around $7000.00 for that——

Q. You paid $3000.00 for it, didn't you, Mr. Gibbs?

438 A. Mr. Rayson, I said around $7,000.00.

Q. I'll ask you if you didn't report on your income tax, Mr. Gibbs, and depreciate a motor that you say bought used for $3,000.00——

A. I never bought any motor used. I bought that new from Kersey Manufacturing Company in Bluefield, Virginia. In fact, I financed it through the South Pittsburg Bank in South Pittsburg.

Q. All right. While I'm looking for that, did you have anything besides the motor in there?

A. No, not as far as machinery, no.

Q. In other words, that represented your total investment or outlay in that mine?

A. It did not.

Q. What else did you have?

A. I had cars, tracks, fans, fan motors.

Q. All right, sir.

A. General equipment to run a mine with.

Q. In this week you say that you produced from this mine of yours—in fact all the mines you had on Tennessee Products lands—318 tons of coal?

A. That's right.

Q. With this equipment that you had?

A. That's right.

Q. And that was a typical week?

A. That was an average week at the time that this
439 mine was in existence.

Q. And yet it's your testimony that you could have gotten this mine over on Gray's Creek up to a production of 2000 tons each in the space of two weeks. That what you're telling us?

A. On a double shift, I think I could.

Q. Did you know what kind of equipment you were going to have?

A. It was discussed later, but not before that.

Q. You didn't know then, did you? You didn't know. You didn't have any idea where the equipment was then, did you?

A. I knew that it wasn't going to be a hand-loaded mine, with a pick and shovel, I did know that.

Q. You were in here yesterday when Mr. Callis said that that mine was to be geared for 600 tons a week production, weren't you?

A. All I know is what Mr. Harwood told me when he hired me, Mr. Rayson.

* * * * * * *

440 Q. But you didn't know anything, of your own knowledge, as to what that mine would produce, except from your discussion with Mr. Harwood?

A. With about 30 years experience, yes, sir.

Q. In any event, you heard Mr. Callis say that he planned such equipment in there that the mine would produce 600 tons a week?

A. 600 tons a week?

Q. That's what he said?

A. I can't recall Mr. Callis saying 600 tons a week.

Q. In any event, Mr. Gibbs, if this mine on Gray's Creek was going to produce 600 tons a week, and there were 5 of them, that would be something on the order of—not 10,000 tons a week as you have estimated on your exhibit—but it would be only 3000 tons a week from all those mines, wouldn't it?

A. Well, I know that I could have done better than that.

Q. And so instead of taking just 3½ weeks to deliver that coal, it would have taken you quite a bit longer, wouldn't it?

A. If I didn't run that much tonnage, yes, sir.

Q. How many tons of coal do you estimate that you'd be carrying on these trucks?

A. About 22 tons on a ton load.

* * * * * * *

441 Q. Now what sort of trucks did you have?

A. Tandem, 10-wheeler.

Q. Tandem, 10-wheeler trucks?

A. That's right.

Q. Those 3-axle trucks?

A. Yes, sir.

Q. Mr. Gibbs, I'll ask you if it isn't a fact that the law would permit you only to carry something like 13 or 14 tons——

A. I think I answered that earlier this morning—that they don't enforce the axle-law over there, Mr. Rayson.

Q. Well, regardless of whether the law enforces the law over in your county, do you know what the load limit for a truck of your type is?

A. I know what it's—the license calls it.

Q. Well, do you know what the load limit is for your truck, sir.

A. The only way I can answer is the only size license they would sell to me for the truck, and I know what the gross weight calls for, but I do know what I'm hauling, and I'm not being bothered, so that's the only way I know to answer it.

Q. You don't know that the gross weight that you can carry on that truck is 45,000 pounds?

A. My license receipt does not say that.

Q. I beg your pardon?

A. My license receipt doesn't call for 45,000.

442 Q. Mr. Gibbs, I believe that you have also testified that you do not have any certificate or permit from the state of Tennessee to engage in business as a contractor?

A. No, sir, I don't have, and I don't know of anybody else has one over there in the coal business.

Q. Prior to these contracts that you had with the Pikeville Coal Company and this Grundy contract, were you hauling coal from your own mine and coal which you purchased?

A. Yes.

Q. Those are the only contracts you've ever engaged on, as a contract hauler?

A. Mr. Rayson, I've bought coal from practically every operator in that country up there and delivered it to different places.

Q. Yes, sir. You bought, I believe, 96,000 tons of coal, for example, in the year 1961, didn't you?

A. Yes, but I didn't deliver that coal, Mr. Rayson.

Q. How much did your trucks weigh, Mr. Gibbs? Unloaded?

A. Same thing as I told you this morning, about 19,500 to 20,000.

Q. All right, sir. I think I asked you this question a couple of days ago, Mr. Gibbs. You say your leases with Tennessee Products were oral or written leases?

A. Some of them oral, some of them written.

Q. Did they contain a clause in them that Tennes-
443 see Products could cancel them on 30 days notice, or something like that?

A. The ones that I had in writing, yes, sir.

Q. That's all.

Redirect Examination,

By Mr. Van Derveer:

Q. Mr. Gibbs, did you finally lose some of your trucks?

A. Three of them.

Q. Why?

A. Because of lack of business——

Mr. Rayson: We object to that—that is not a basis for any recovery. It might be a basis——

The Court: I believe this matter has been fully covered previously in testimony, has it not?

Q. Let me ask you this, on a little different aspect of it. Mr. Rayson has asked you about some of your income tax returns here, as to whether you made or lost money. For the year 1960, which is the year involved, I'd like to hand you your income tax return and just tell the jury how you did that year? That's the year involved.

A. Up in the left hand corner—as the others—it says a loss of $44,713.33.

Q. I'd like to pass that to the jury and let them see it, please. Now, Mr. Gibbs, in computing your income for any of these years, and taking into consideration
444 the purchase of these trucks, do you know how the depreciation was handled on those tax returns?

A. On a five-year basis, to the best of my knowledge.

Q. All right, sir. And does that depreciation allowance that is in here account for some of this loss that is shown on——

A. Absolutely.

• • • • • • • •

445 Q. All right, Mr. Gibbs, go ahead.

A. The way the depreciation is set up on these trucks is on a five-year basis and we took the amount of depreciation, which I think to the best of my knowledge—on 1960—was about—close to $30,000.00.

Q. All right, sir.

A. And the deduction from that showed on a paper loss and out of my pocket of somewheres in the neighborhood of $15,000.00.

Q. All right, sir. Now, Mr. Gibbs, since you had been engaged in the coal mining business over in that area, as you told us before, buying, selling, hauling, whatever it was, state whether or not the offer or job that you had from Grundy Mining was the best or the worst that you'd ever had?

A. Well, it's the best job that I'd ever had offered to me in my life.

Q. All right, sir. And at the time the job was offered to you, did you have the equipment necessary to do the job?

A. Trucks?

Q. Yes, sir.

446 A. Yes, sir.

Q. Now, Mr. Rayson has interrogated you quite

forcefully about whether from these mines and all, the production figures that you have given—that is, 10,000 tons a week—could have in fact been produced in those mines?

A. To my knowledge, yes.

Q. Now, what do you base that on?

A. On about 30 years experience that I've had in coal mining.

Q. And you went out—did you actually go out and see the area?

A. I most certainly did.

Q. All right, sir. I believe there's nothing further, if it please the Court.

Recross-Examination,

By Mr. Rayson:

Q. Mr. Gibbs, if I could step up there to you and ask you a question or two. I'm going to show you your depreciation schedules for 1959 and 1960. I will ask you if what you did was to buy these new trucks in 1959, sometime in March or May of that year, but not take any depreciation that year, but take it all in 1960?

A. I didn't make that income tax return, Mr. Rayson, I don't know.

Q. In any event, I believe you do know that the
446 depreciation you took on these new trucks, that you bought for the Pikeville Coal Company job, was what resulted in your loss, or a big part of your loss, in 19——

A. No. All that I can answer there is that three of the trucks were repossessed last year.

Q. Well, that's in 1961?

A. That's right.

Q. And those repossessions occurred after your Pikeville job? Isn't that right?

A. And, furthermore, in the statement that you'd asked me before, that I had to get the American National Bank to buy the account to keep from the losing the trucks back to the Yellow Manufacturing Company, and we got the payments set up on two or three different occasions, and I paid the interest on the notes, and then finally lost three of them, anyway.

Q. Now, this last question, Mr. Gibbs. You had your trucks repossessed after your Pikeville Coal Company contract was cancelled, was it?

A. Yes, sir.

Q. And that's what you're suing Tennessee Products $276,000.00 about, isn't it?

A. Not losing the trucks.

Q. But losing the contract?

A. Well, there might be something to losing the contract, but not for losing the trucks.

448 Q. Well, $276,000.00—that's what you say you'd make on that contract, isn't it?

A. I didn't make any figures on it.

Q. Well, you do know you're suing Tennessee Products for $276,000.00 in connection with the cancellation of your Pikeville Coal Company haulage contract?

A. As far as I know right now, there's not any suit in existence.

Q. You deny that you did not sue——

A. I did not say I didn't sue, I said as far as I know—to my knowledge, rather, I don't know of any law suit against Tennessee Products in existence.

Q. That you have?

A. That's right.

Q. But you do say that you did sue them for that amount?

A. I'll say yes to that part of it.

Q. All right. Whether or not it's pending now you don't know?

A. That's—I said I didn't know.

Q. That's all, your honor.

JOHN E. MARSHALL,

having first been duly sworn, testifies as follows:

Direct Examination,

By Mr. Van Derveer:

Q. Will you state your name, please, sir.

449 A. John E. Marshall.

Q. And your occupation?

A. Certified Public Accountant.

* * * * * * *

Q. At my suggestion, Mr. Marshall, did you meet with me, and after that did you meet with Mr. Gibbs in an effort to work out schedules from books and records that he had?

A. I did.

* * * * * * *

450 Q. And Mr. Gibbs showed the books and all to both you and to him, is that correct? And from those books now, there has been two schedules prepared here. The first has been identified here as Plaintiff's Exhibit No. 33, which I show you, sir, and it relates to the profit or loss, if any, that Mr. Gibbs, would have made from the mines of Tennessee Products?

A. Yes, sir.

Q. Do you have your base figures there from which you prepared these schedules?

A. Yes, sir. I have.

Q. Now I believe that you've met with Mr. Gibbs and

myself and Mr. Walker and with Mr. Ables last evening after court adjourned, did you not?

A. That's right.

Q. Now, where did you get the figures there for coal savings?

A. I got these figures from his cash book, I guess you would call it for the year 1960.

Q. And are those the actual figures that were taken from there?

A. Yes, sir.

Q. Now, tell us briefly how you arrived at the tonnage that is set forth there?

451

A. First of all, I added the—there are certain salaried labor costs here, $509.00 for loader.

Q. Yes, sir.

A. And Mr. Gibbs told me to divide that figure by 16, and that gave me an amount of 318.28 tons.

Q. All right, sir.

A. And then he pointed out to me a transaction where he had purchased coal for $395.28 and he told me to divide that by 2, and that gave me 197.64 tons, or a total number of tons of 515.92.

Q. Yes, sir. Which means a gross intake or gross sale for that week of what figure?

A. Well, he told me that he got $4.05 a ton.

Q. All right.

A. And that would make it $2,089.48.

Q. Now, Mr. Marshall, underneath there, I believe there are certain labor costs with a list of certain names. Now, state whether or not the names and the amounts paid those people are actual figures that you took from this ledger book?

A. They are. They are the actual figures paid during the week, ended August 12, 1960.

Q. Now, down through there, you have certain other

figures on the operation and cost of operation of his trucks, and so forth at a given figure. Now tell us, sir, how you arrived at those figures?

452 A. The first item is—deduction of trucks is gasoline, $280.00.

Q. I think we can shorten it—that to some degree, in this regard. You have 25% figured on each of those. Where did you arrive at the 25%?

A. Well, I don't know whether this was brought in the testimony or not, but we originally estimated that he would use 8 trucks in this other operation.

Q. In the Grundy operation?

A. That's right. And each one of those trucks would make a round trip of 10 miles, 2 shifts.

Q. So this is based on how many trucks?

A. This is based on 2 trucks. Also making 20 miles a trip.

Q. Ok, sir.

A. 25%—of——

Q. Then your total expenses deducted from your income gives you a net of what for that?

A. $638.16.

Q. Now, Mr. Marshall, if I understand you correctly, sir, last evening when we were working on that, all of those figures, or that figure, is just confined to that one particular week. Is that correct, sir?

A. That's right.

Q. You made no attempt to arrive at every week, did you?

A. No, sir.

453 Q. But now are the same figures in these ledger books from which each and every week could be computed?

A. Yes, sir.

Q. Now whether the figures that you have related and

testified to here, the jury, the amount of $638.16, is or is not an average or typical week, you have no information?

A. No, sir.

Q. But the basic underlying books are here, are they not?

A. That's right.

Q. All right, sir. Well, now let's move over to this other computation that has been made, which has been identified here as the Plaintiff's Exhibit No. 34. Now when, sir, did you prepare, and this is your work, is it not?

A. Yes, sir.

Q. When did you prepare this Exhibit No. 34 that you——

A. This morning.

Q. At approximately what time?

A. About 11:30.

Q. About 11:30. Now you have arrived here at a figure of $27,300.00, which is based upon what?

A. Based on 35,000 tons at 78¢ a ton.

Q. All right, sir. For what period of time?

A. Well, it would be for 10,000 tons a week—it would be for 3½ weeks.

Q. All right, sir. Now underneath that you have
454 certain expenses. Now state whether or not the method which you used in computing these expenses is the same method that you used in the others?

A. It is.

Q. Leaving an estimated net profit for that 35,000 tons of Navy delivered coal in what figure?

A. $14,029.28.

* * * * * * *

Cross-Examination,

By Mr. Kramer:

Q. Mr. Marshall, taking first Exhibit No. 33. Did, which I understand you have introduced here, or as Mr. Gibbs

has said, is an average week, did you go through any number of weeks and calculate out to see that this was an average week?

A. No, sir.

Q. How do you know this is an average week for any period of time?

A. I don't.

Q. In other words, you took what Mr. Gibbs said,
455 rather than going through an ordinary accounting procedure and determining what an average week was, didn't you?

A. Well, that's possible. I was instructed to figure one week.

* * * * * * * *

470 **C. H. KILBY,**

having first been duly sworn, testified as follows:

Direct Examination,

By Mr. Van Derveer:

Q. Would you state your name, please.

A. C. H. Kilby, Sr.

* * * * * * * *

A. Tracy City, Tennessee.

Q. And in what business are you engaged?

A. I am a tax consultant and also fire insurance.

Q. Do you, there in Tracy City, keep the books and counsel on tax matters with any number of people?

A. Yes, sir.

Q. I mean you're not employed by any particular person, but just in the generalness of tax consulting business?

A. Yes, sir. I have a client business.

Q. And as such each year do you fill out many tax returns?

471 A. Yes.

Q. Do you know this Mr. Paul Gibbs?

A. I do.

Q. For a number of years have you been filling out and keeping his tax returns?

A. Many years.

* * * * * * * *

472 Q. Now, Mr. Kilby, some question has been brought into the authenticity of these tax returns by the depreciation charged. Mr. Rayson asked Mr. Gibbs certain questions about it. Now just tell the jury how the depreciation was charged on these various schedules for the year 1960 or any other of the years?

A. How it was set up?

Q. Yes, sir.

A. Is that the phrase?

Q. Yes, sir.

A. Each item is set up in the year—during the year in which it was bought. The following income tax period by the bill of sale on that piece of equipment and our estimated number of years of life. Then that is carried forward on the basis, until it runs out, in the case of trucks or other machinery, is set up on the basis of estimated years that we estimate it will last. Then on the next year any new equipment is added, this other is carried forward, minus that one year of depreciation that it has already suffered. But each year the new equip-

473 ment that has been purchased the prior year that is to be used in that taxable year is set up newly and it's taken from the bill of sale on the purchase of it.

Q. Now, sir, is that an acceptable method of determining depreciation schedules?

A. It certainly is, yes, sir.

Q. Now, Mr. Rayson has challenged the validity of your depreciation for the year 1960. So I'll ask you, sir,

whether there was undue depreciation charged in the year 1960 or whether it was lumped over into the year 1960, or was that the same method that has been followed throughout?

A. The same method was followed, using our estimate of the life, of the life of the unit that was purchased, and the same system was followed year after year, has not been questioned by the Internal Revenue Service.

Q. Now you have before you, I believe, the tax returns for the year 1956 through '61, do you not?

A. That's what I recognize here, yes, sir.

Q. And have those returns been audited and checked by the Internal Revenue Service of the United States?

A. There has been no question, no audit instituted by the Internal Revenue Service on any of these years that I have recalled.

Q. Have they been checked in any way?

A. Only from a new tax that developed.

474 Q. Yes.

A. And that was carried back for some two or three years, which increased our loss.

Q. Which increased your loss?

A. Increased our loss, yes, sir.

Q. In other words, by the Internal Revenue scrutiny, it increased rather than decreased your loss?

A. Yes, sir. And it had nothing to do with the depreciation. Had nothing to do with that. It was what they called a salvage tax, and they made us set up a certain amount of money, a certain value on that equipment, and they call it a salvage tax.

Q. Yes, sir.

A. And they set that up on each piece of our equipment in order to protect a trade in value on some new equipment.

Q. Yes, sir.

A. And they call that taxable income.

Q. Now, Mr. Kilby, where did you obtain the figures that you used on these tax returns for the income that was derived by Mr. Gibbs for each of the years?

A. Those figures were given to us each year by the Coalmont Savings Bank with whom he does business.

Q. They were not given to you by Mr. Gibbs? Or but by the bank, as I understand it?

A. I have had the bank sometimes furnish it to me and there have been times that it's furnished to him.

475 Q. But you got your figures from the bank?

A. Yes, sir. The figures that we used on the income tax were the deposit figures from the Coalmont Savings Bank.

Q. So you know that what you put down there, the figures you got from the bank, is that correct?

A. Yes, sir. We receive them from the bank.

Q. Now the charges and the deductions, etc., have you ever seen what has been here identified as Mr. Gibbs' ledgers, have you ever seen these?

A. Yes, sir, I do.

Q. What are those?

A. They are—that carries the expenses incurred throughout the year for the purchase of supplies and miscellaneous expense, for the operation of the mines, and for the repairs, and so forth, of his trucks. I believe that's it.

Q. And are those figures, or the figures that you obtained from these ledgers, the figures that you have used on those tax returns?

A. The exact figures, yes, sir.

Q. So whatever is on that tax return, as I understand, in that regard, the supporting or underlying document is in this ledger, is it?

A. Yes, sir. Each page that has been totaled down there,

that total has been used over here for the expenses against——

Q. Now, Mr. Kilby, you've been there in Tracy City
476 for many years. Is the set of books that is kept by Mr. Gibbs—or you helped him keep—the same type and kind of books that are kept by practically every miner over there?

A. On this type of business—the coal mining business and the coal hauling business—the answer is yes.

Q. Now are you satisfied yourself as to authenticity and the correctness of those returns that you have filed?

A. Most assuredly.

Q. You may ask him.

Cross-Examination,

By Mr. Kramer:

Q. In the figures that you show, or that Mr. Gibbs shows, in these income tax returns that are filed here as various exhibits, I refer first to the first item on them as figures go. Did you make any breakdown at all or check for any breakdown between types of business that Mr. Gibbs was engaged in?

Mr. Van Derveer: If it please the Court, is Mr. Kramer directing that toward any particular year or all the years?

Mr. Kramer: I think, as I see these, they are all the same, aren't they?

Mr. Kilby: The first item shown on all of these, but just shows total receipts——

Mr. Van Derveer: Just so the witness will understand. There may be some variance; I don't know.

Mr. Kramer: I take it these forms have been uni-
477 form during this period——

Mr. Kilby: I just wanted to get your total question. I was just waiting——

Q. The first item on dollars that appears in these is the total receipts from the business. In other words, item one—may I approach the witness, your Honor?

The Court: Yes.

Q. Item one, I show you now exhibit number, it should be numbered—but it's for the year 1956, item one—which is, and I think has been uniform throughout these years on these forms furnished by the federal government, hasn't it?

A. That's correct. There has been no change on that item right there, no.

Q. And that item shows total receipts. Now, for instance, this item is $310,247.08.

A. Yes, sir.

Q. Now, did you have any breakdown from what those receipts came?

A. No, sir. That represents a total income for that year from all categories—from any and all.

Q. From any and all?

A. Yes, sir.

Q. Now you know that Mr. Gibbs was engaged in a number of different types of business, don't you?

A. Yes, sir.

478 Q. And part of it was from the operation of a coal mine, part of it from hauling operations of coal, part of it was from hauling sand and other commodities and various other types of businesses that you're familiar with, but there's no breakdown to show what income he had from the hauling of coal, is there?

A. No, sir.

Q. And when you——

A. Not as far as I know.

Q. All right. And when you put those figures on the income tax return, of course, you put what either he gave

you or the bank gave you, just as total income from all his various types of business?

A. Yes, sir. Coming from the bank.

Q. Well, that came from the bank?

A. Yes, sir.

Q. Well, some of them he got from the bank and gave to you, didn't he; but they came either directly from the bank to you or from the bank through him to you?

A. Yes, sir. But most of the time directly to me.

Q. All right. We're not challenging that. But what we do say is that this did not cover only income from coal haulage, did it?

A. No, sir.

* * * * * * * *

479 Q. All right.

A. Yes, sir. As far as I know.

Q. I believe we have a non sequitur or a non following up. Would you explain what you mean, so far as you know, so that these ladies and gentlemen will understand?

A. I do know that he was engaged in hauling coal. I do know that he is engaged in operating a mine at times. Further than that I cannot say.

Q. You don't know what other kind of business he may have been engaged in and the money included in that bank account?

A. No, sir.

Q. Do you know whether it's included in that bank account any cash receipts he received from sales of equipment?

A. No, sir.

Q. Don't know that?

A. No, sir.

Q. You don't know what other type of income he may have had that went into that deposit?

A. I would know this: That if there was any sale of equipment that we'd have to make out on a special form which they call a schedule D——

Q. Yes.

A. A schedule D.

Q. I'm coming to that schedule in a moment——

A. Yes, sir.

480 Q. But what may have gone into that income is the figures that you got from the bank, simply was total deposits?

A. Yes, sir.

Q. Regardless of what that deposit may have been from?

A. Yes, sir.

Q. Now, let's go to this depreciation figure that we've talked about and that you did with Mr. Van Derveer. Did you attach to these income tax returns depreciation schedules?

A. Every time.

Q. Do you recall that in the spring of 1959 Mr. Gibbs bought a substantial amount—of quantity of new equipment?

A. I'll have to say that I believe that was the time—about that time. Now, the question again, please, sir.

Q. I'll ask you if there was attached to the 59 schedule——

A. That's right——

Q. A return rather—a schedule for depreciation?

A. That's right.

Q. All right. Let me have it please. You have now handed me the schedule for depreciation for the 1959 return, is that right?

A. Yes, sir.

Q. You have two methods, do you not, that are acceptable to the federal government, for counting depreciation,

what we call accelerated depreciation in which you take a more rapid depreciation the first year than you do in the later years?

481 A. I have only used the one.

Q. But there is such——

A. Yes, there is, yes, sir. Now.

Q. And you did not charge any accelerated depreciation?

A. No, sir. I did not.

Q. But isn't that the established practice of all industry to use the accelerated——

A. It is now, yes, sir. You can take a larger percent for the first year, which has not been done with my client, in this instance.

Q. But that is the accepted practice for taxes in industry, but you didn't do it then?

A. Yes, sir.

Q. And if you had, the 1959 return would have showed a larger deficit than it does show, wouldn't it?

A. It would show a larger loss, yes, sir.

Q. Considerable amount, too, wouldn't it?

A. Sir?

Q. A considerable amount?

A. Yes, sir. I believe it would have.

* * * * * * * *

482 Q. Would you just take a pencil and tell us how much new equipment was bought in 1959, it shows on that return. You want a pencil?

A. No, sir. No, sir. I'll take it this way. 6 pieces of equipment.

Q. For the total cost of how much?

A. For a total cost of—in round figures—$100,000.00. In other words, 6 pieces of equipment at $16,500.00 a piece.

Q. Now, so we don't get these mixed up, you know better than I do where this schedule——

A. It belongs right here, sir.

Q. May I have just a minute, please, your Honor. This equipment that you was talking about depreciation—that we've been talking about here—is mine machinery and equipment, isn't it?

A. No, sir.

Q. What was it?

A. Those are large trucks.

Q. And you only figured on a 20% or five—well, it wouldn't be necessarily 20%—but on a five year basis of life?

A. No, sir. I figured on a three.

Q. Well, there has been testimony—I think Mr.
483 Gibbs—I guess he was just mistaken. He said they were figured on a five year basis, but I guess he was just mistaken. And you did figure them on a three year basis?

A. I'm not sure. Let me see, please, sir.

* * * * * * *

Mr. Kilby: These are set up on a five years. I had to look to be sure.

Q. You were mistaken a minute ago when you said three years?

A. I was, yes, sir. Three years instead of five years.

Q. Now, ordinarily trucks used in heavy industry has depreciation set up on a three year basis, don't they, and that's the basis that the government will recognize? Of course, it will recognize five, but it also—the government does, in its regulations for trucks used in heavy industry, heavy hauling, recognizes three year basis for depreciation, doesn't it? Take a third of 'em off each year. Of course,
these wouldn't all be a third because some of them
484 were only 8 or 9 months. But at the rate of 33 and ⅓ per cent a year, the government recognizes that in counting depreciation, doesn't it?

A. We have been recognized at five, four and three.

Q. Yes. Five, four and three?

A. Yes, we've been recognized.

Q. And you recognize the fact that industry ordinarily in heavy trucks of this sort—I'm not talking about small panel trucks—but in heavy trucks of this sort used in heavy industry like the hauling of great loads of coal—22 tons, or whatever it was for trip on them—usually industry uses a three year basis for counting depreciation, doesn't it?

A. I can't answer that.

Q. Well, if a three year basis were used, of course, the loss in 1959 would have been greater?

A. Is that a question?

Q. Yes.

A. The answer is yes.

Q. And you say that you're not familiar that industry ordinarily uses the——

A. I'd rather not go outside—of my experience.

Q. Your knowledge, you think, is not sufficient to answer my question?

A. No, sir. I do not say that. I say that I'm no harpist, and I know the life of our—the estimated life of our trucks and the experience that we've had, and this is it.

* * * * * * *

485 Mr. Van Derveer: We rest.

* * * * * * *

486 Mr. Kramer: There is no material or substantial showing in this case of any secondary boycott. In the absence of any material or substantial showing that there was a secondary boycott from which the plaintiff suffered injury, this case we submit is without jurisdiction, and our motion is that this case be dismissed for that reason, your Honor.

Mr. Van Derveer: Of course, our position is that there has been proven a secondary boycott. Certainly, in looking at that evidence in that light most favorable to the plaintiff at this point that there is a submittable issue to the jury on that point. Now, I don't care to say a lot more, unless the Court is desirous of hearing further. If so, and the court desires that I do so, I will take up each—or will attempt to take up each piece of evidence, bit by bit, and weave it together and show the Court why we say that their motion is not well taken at this time.

The Court: All right. Do you desire to argue your motion any further, Mr. Kramer?

• • • • • • • •

521 The Court: All right. I believe the motion should be overruled. Is there anything further at this time?

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523 **ALBERT PASS,**

having first been duly sworn, testifies as follows:

Direct Examination,

By Mr. Owens:

Q. Will you state your full name, please?

A. Albert Pass.

Q. Where do you live, Mr. Pass?

A. Middlesboro, Kentucky.

Q. What is your occupation?

A. Secretary-Treasurer, District 19, United Mine Workers of America.

Q. How long have you had that position?

A. Since March, 1952.

Q. What are the duties of the secretary-treasurer?

A. Keep the records of the finances of District 19, and any other work that may be assigned to you by the district manager.

Q. What did you do prior to becoming secretary-treasurer?

A. I was bookkeeper and stenographer, served on arbitration boards.

Q. Bookkeeper for whom?

A. District 19, United Mine Workers.

Q. How long did you do that kind of work?

A. From January, 1941, until March, 1952.

Q. Are you a member of the United Mine Workers of America?

524 A. Yes, I am.

Q. Who are the officers of the United Mine Workers? District 19, United Mine Workers.

A. J. W. Ridings is president, William Manley Edwards is vice-president, and myself, secretary-treasurer.

Q. All right. Now, do you know where Mr. Ridings is now?

A. Yes, I do.

Q. Will you explain where he is, and what his condition is?

A. He is ill, and he has been for some time. He has been visited by the doctor practically every day or two, and he is only able to get to the office just every now and then for a few hours a day.

Q. And he is in Middlesboro, Kentucky?

A. Yes.

Q. All right. Now, what is the jurisdiction of District 19?

A. The entire state of Tennessee, the counties which produce coal, and five counties in the state of Kentucky.

Q. What is the International Union, United Mine Workers of America?

A. The International Union is composed of the districts of the United Mine Workers of America and the local unions of the United Mine Workers of America.

525 Q. I mean, what is the jurisdiction of the International Union?

A. It is the United States and Canada, the coal producing areas.

Q. Because it has jurisdiction in Canada is why you refer to it as international?

A. Yes.

Q. Does the International Union have membership in all the coal producing states of the country?

A. Yes, they do.

Q. Does it also have membership in Canada?

A. Yes.

Q. Do you know George Gilbert?

A. Yes, I do.

Q. What is his position?

A. He is District 19 district representative, commonly referred to as field representative.

Q. Where is his job, where is he assigned?

A. He is assigned to the territory of Bell County, Kentucky, and a part of Claybourne County, Tennessee.

Q. And how long has he had that assignment?

A. I would say approximately 18 months or two years.

Q. Was he ever assigned to what is called the Palmer or the Whitwell or the Tracy City area?

A. Yes, he was.

526 Q. Do you know when he had that assignment?

A. It was shortly after I became secretary-treasurer, I believe it was in 1953.

Q. And how long did he stay there?

A. Until he was transferred to Bell County, Kentucky, and other territories surrounding.

Q. Do you know when he was transferred?

A. I believe it was in 1961, between February and July, I believe. I'm not positive, but it is somewhere in '61.

Q. Who was then assigned to that area?

A. Howard Mabry.

Q. He is a field representative with the same duties?

A. Yes.

Q. Now, do you know if the District 19, International Union, had a contract with the Tennessee Consolidated Coal Company?

A. Yes.

Q. Do you know when that was terminated?

A. March 15, 1960.

Q. Was that the final date of the contract or was notice of termination given prior to that?

A. That was the termination date. The notice was given 60 days prior to that date.

Q. And the mines did not operate from then on, under the Tennessee Consolidated Coal Company?

527 A. That's true.

Q. I am going to direct your attention to the dates of August 15th and 16th of 1960, and ask you where you were?

A. I was in the office at Middlesboro, Kentucky.

Q. I want you to describe what you were doing on the 15th and the 16th of August, 1960?

A. We had a district executive board meeting on Monday, the 15th, and a part of the day on Tuesday, the 16th.

Q. What is the district executive board meeting, what do you mean by that?

A. That is provided for by the constitution and it consists of the field representatives and the executive officers of the district.

Q. And what do they do?

A. Their functions are to accept and hear appeals from individual members of local unions, from local unions, and from local union officers, who feel that they have been unjustly dealt with or unjustly treated by the local unions of which they are members, or between local unions.

Q. All right. Now, who was present at that meeting on the 15th and 16th of August, 1960?

A. The president, vice-president Edwards, myself, and all of the field representatives.

Q. Well, name them?

A. Well, there was George Hall, C. E. Floyd, Ernest
528 Stubbs, Leslie Jones, Jack Ewton, Taylor Maddox, George Gilbert, Howard Mabry, C. E. Ross, and I believe that's all.

Q. And Ray Harris. Do you remember Mr. Gilbert being there on the 15th and the 16th of August?

A. He was there on the 15th and he was there a part of the day on the 16th.

Q. How long was he there on the 16th?

A. He was there until noon.

Q. Did he perform any other duties while he was there in the office other than attend meetings?

A. Yes.

Q. What else did he do there?

A. Mr. Ridings and I talked with him, I had received a telephone message that people were attempting to take the jobs of the employees of Tennessee Consolidated Coal Company, and I talked with Mr. Ridings and we talked to George.

Q. Now, you say you received a telephone call. Who did you receive a call from?

A. Henry Turner.

Q. Who is Henry Turner?

A. He was a safety committeeman and a mine committeeman for local union 5881, which has jurisdiction or had jurisdiction, rather, over Tennessee Consolidated Coal Company at Palmer.

Q. And then—what was his first name?

529 A. Henry Turner.

Q. What did Mr. Turner advise you?

A. When he first called he wanted to know where George Gilbert was, and I told him he is here, we're having a district executive board meeting. He said there is some men down here trying to take our jobs and we need to see him, and I said I'll talk to George and get him on the way as soon as I can. That was just about the extent of the conversation.

Q. Did you talk to Mr. Gilbert?

A. No, first I talked with Mr. Ridings.

Q. And then did you and Mr. Ridings talk to Mr. Gilbert?

A. Then Mr. Ridings called Mr. Gilbert into his office and we talked with him.

Q. Did you tell him about this conversation?

A. Yes.

Q. Now, do you know a man named Bryan Parmlee?

A. Yes.

Q. Who is Bryan Parmlee?

A. He is the financial secretary of Pocket local union.

Q. All right. Was Mr. Parmlee there?

A. Yes, Mr. Parmlee was there.

Q. What was he doing there that day?

A. Mr. Parmlee was there checking on membership dues of members of his local union, and checking on dues that were checked off, the employees of the op-
530 erators under the jurisdiction of his local union, and on hospitalization cards and pension applications.

Q. Mr. Parmlee, do you know if he left with Mr. Gilbert?

A. No, I don't recall whether they left the office together or not. I don't recall.

Q. And how long did Mr. Gilbert stay in the office on August 16th?

A. We talked to him right after the meeting, and I

guess we probably talked to him 15 or 20 minutes, and he left right after we talked with him, and he went out of the office and I assume he left.

Q. Well, in this meeting did you give him any instructions or orders in relation to this situation at the Consolidated mines or the Grundy mines?

A. Yes, he was instructed to go down there and make an investigation and see what the situation was and report back to us, Mr. Ridings and myself, or both of us, and if there is any picketing going on as was indicated in the conversation with Mr. Turner, to do all he knew how to do to limit that picketing to the mines; and to reduce, as far as possible, if there was any picketing, the number of pickets as low as he possibly could; and further to see that there was no other mines closed down because of the Gray's Creek situation.

Q. At that time did you have other mines that were operating and were operating under contract in that area?

531 A. Yes, yes.

Q. I understand you told him to limit the picketing and make sure they didn't picket these other mines because of this?

A. That is what we told Mr. Gilbert to do.

Q. Now, Mr. Pass, there is some evidence in the record that District 19, sometime in 1960, gave some aid to the membership? Did you have anything to do with that?

A. Yes, I was assigned the job of setting it up.

Q. All right. Now, I want you to tell me, in this area, what—when this aid was given, what it was for, and who got it, and what were the qualifications to receive this aid?

A. Well, this mine was shut down by the company on termination on March 15th, 1960. Of course the members of the union immediately applied for unemployment in-

surance, and they did draw their unemployment insurance. About the time that the unemployment insurance began to play out or become exhausted the local union officers began to talk of calling Mr. Ridings and myself and asking what we could do to help them out, that some of them were getting hungry, and school was starting soon, winter coming on and they needed coal. In fact that is one of the things that George Gilbert talked to us about when he was in Middlesboro on the 15th and 16th. So, we discussed the matter and we decided that until such time as the unemployment insurance was exhausted that we would not issue any relief. So
532 we went ahead until we got up to the convention in Cincinnati. Of course the delegates were there from that local union and we had another meeting in Cincinnati with the delegates from that local union. We told them that as soon as we got back from the convention, I believe the convention started somewhere around the 4th of October and I think it lasted about 10 days, that we would check into the matter again and let them know. Finally it wound up that we started to issue relief about the first week or the beginning of the second week of November of 1960.

Q. Now, who did you give this relief to?

A. We made a thorough investigation and the people who were receiving—some of them were at the time we started it, unemployment compensation, members who had obtained jobs at other work where they had an income, members whose wives were employed and had an income, or any income in the family by the fact that some other member was working, we disqualified those people; and we only gave the relief, as far as we could determine, to those members and their families who were destitute. I would say that approximately a third of the coal men did not receive relief.

Testimony of Albert Pass

Q. Now, I think the evidence has been introduced into the record that in 1960, during those months of November and December, that this total amount of this relief was approximately $24,000 and some odd dollars. Is that figure about right?

533 A. Well, I don't know what it amounted to but we gave each one of those members that we decided were eligible $25 a week in the form of a grocery —in the form of a voucher, and this voucher was made payable to the grocery store that the member chose to trade at. The reason we did that, we figured they had been trading with these merchants all these years and we thought that they should continue to trade with them, so we made the voucher payable to the grocery stores. Smith Grocery Company, for example, please let this member have $25 in groceries. That was signed by Albert Pass, as secretary-treasurer, with the district seal on it. The member would take that voucher to the grocery store and get his groceries. He was limited to one carton of cigarettes, he could not obtain due bills, groceries only. Then, the merchant would bundle up those vouchers and mail them to my office and we would issue a check payable to the grocery store. Now, that lasted until, that——

Q. That continued on until they went back to work and they were no longer destitute. Let me ask——

A. After they had been off from work so long, a lot of them had house rent to pay, and they needed money to spend. So, we again had a session, Mr. Ridings and I did, and we decided that one check out of the month, once each month, we would give them both. That instead of writing the voucher, we would write a check to

534 the individual member so that he would have some money for drugs or coal or lights or house rent or whatever he wanted to spend it for.

Q. Now, was there any qualification to receive this that these men had to become pickets or engage in any kind of activity like that?

A. Absolutely not. There wasn't.

Q. Now, did the district, you or any of the district officers, authorize any picketing of the Grundy Mines by anybody?

A. No.

Q. Did you have any knowledge that there would be any picketing or that even that the Grundy Mining Company was going to open this Gray's Creek mine on August 15th, prior to the receiving of this telephone call from Henry Turner?

A. I didn't have any knowledge that they was going to be any picketing, and I didn't have any knowledge that they was going to open on the 16th, but I did have knowledge that they were going to open the mine at Gray's Creek.

Q. Did you know when they were going to open it?

A. No.

Q. Where did you receive this knowledge?

A. I received this information from Stanley Hampton, the president of Tennessee Consolidated Coal Company. Paul Callis at that time was vice-president of that company in charge of sales, Everett Roberts, who was
535 general manager, I believe, on different occasions.

Q. Was this during the negotiations that you had with these gentlemen concerning signing a new agreement for Tennessee Consolidated?

A. The first time that I learned about it, we had a meeting with the officials of the company along with the mine committee on a question of absenteeism. The company told us that if the men didn't begin to work more regular, and increase production, that they didn't know what they was going to do. Then in the course

of the discussion they advised us that some time in the future that they were going to open another mine at Gray's Creek, and that the men that were working at the Cove Valley and the men that were on the panel would be placed to work at the Gray's Creek mine, in the same manner that they placed the men to work in the Cove Valley mine from the old mine that worked out, which was in '49. They mentioned that several times in meetings that we had with them——

Q. Before you get into that, may I interrupt you to ask you, you mentioned the word panel. Now, will you explain what is meant by panel?

A. A panel is a list of names of the employees who have been cut off from work because the company is reducing their work. Then if they increase their work, of course, the men that they employ, they go to that list of names and re-hire the employees.

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536 Q. Mr. Pass, I'll hand this document to you and ask you if you can identify that?

A. Yes, I can.

Q. Would you state what that is?

537 A. That is a charter granted to local union # 7083, the United Mine Workers of America, by the International Union of the United Mine Workers of America, on March 20th, 1935.

Q. What was the local union?

A. # 7083.

Mr. Owens: I ask that that be marked for identification. It will be defendant's exhibit # 1.

The Court: Let's continue to number numerically.

Reporter: It will be # 35.

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Q. Mr. Pass, I hand you another document and ask you if you can identify that one?

A. Yes, this is a charter granted to local union # 5881, United Mine Workers of America, by the International Union, United Mine Workers of America, dated the 29th day of June, 1933.

Mr. Owens: I move that that be admitted into evidence.

The Court: All right.

Reporter: # 36.

538 Q. Mr. Pass, you testified Friday that the Tennessee Consolidated Coal Company cancelled their contract on the Coal Valley Mine effective in March of 1960. When was that mine reopened?

A. That mine was reopened about May the 23rd, 1961.

Q. What was the name of the company that reopened it?

A. Allen and Garcia Coal Company.

Q. And did they operate and manage that mine for the Tennessee Consolidated Coal Company?

A. Yes, they did.

Q. Did they sign a contract with the United Mine Workers of America?

A. Yes, they did.

Q. And, how long did they operate that mine?

A. I believe that operated that mine until about September of 1962.

Q. Was it closed down then?

A. Yes, it closed. The mine fell in.

Q. All right. When did they open their next mine?

A. I believe it was in September that they—somewhere along there, that they moved over to Gray's Creek, took the employees from the Coal Valley mine and opened that mine.

Q. Do you know the date that they opened the Gray's Creek mine?

A. I believe it was the latter part of September, if
539 I am not wrong. Somewhere along there.

Q. September of '61?

A. Of '62.

Q. And this is the Allen and Garcia Company?

A. Yes.

Q. Could it have been as early as June or July?

A. My recollection is that it is somewhere around September, I may be mistaken but I believe that is correct.

Q. All right. When did the Allen and Garcia Company cease operating that mine?

A. Which?

Q. The Gray's Creek mine.

A. That wasn't September. Allen and Garcia moved over to Gray's Creek in the process of opening that mine in July, I believe, and they started underground, got all the buildings erected and the tipple to put the coal in, and then Grundy Mining Company took over from Allen and Garcia.

Q. Now, do you know when Grundy Mining Company took over?

A. I believe that was in the latter part of September.

Q. September of this year?

A. This year.

Q. And the Gray's Creek mine is the—is in the area where the Grundy Mining Company had faced off in 1960?

A. In the exact territory.

540 Q. Now, did Paul Gibbs have a contract with the United Mine Workers of America for its two mines on the Tennessee Products property?

A. Yes, he did.

Q. Was that contract ever cancelled?

A. No, he worked the mines out, both of them.

Q. And, neither side ever cancelled that contract?

A. No, sir.

Q. And, did you continue to receive dues from Paul

Gibbs, checked off of his employees, from August, 1960, until those mines closed?

A. Yes, we did.

Q. And, also from his truck drivers?

A. Yes.

Cross-Examination,

By Mr. Van Derveer:

Q. Mr. Pass, you are the secretary-treasurer of the International, I believe, are you not?

A. I am secretary-treasurer of District No. 19.

Q. Who is secretary-treasurer of the International?

A. Mr. John Owens.

Q. John Owens? Is he your boss?

A. Mr. Ridings is my boss.

Q. Let's see, now. You are secretary-treasurer of District No. 19, and Mr. John Owens is secretary-
541 treasurer of the International?

A. Yes.

* * * * * * *

Q. Now, Mr. Pass, you are appointed by the International, not elected, are you?

A. I was appointed by the International president, and approved. Such appointment was approved by the International.

Q. And, the president of the International is Mr. John Owens, who is superior to you, and on the executive board?

A. Mr. John Owens is secretary-treasurer of the International Union.

Q. Well, that is where your money comes from, isn't it?

A. District No. 19's money comes from the mem-
542 bership dues of the members under the jurisdiction of District No. 19.

Q. Are you telling this Court and this jury that Dis-

trict No. 19 has not been getting funds directly from the International?

A. Oh, no.

Q. Then you are telling them that District No. 19 has been getting funds directly from the International?

A. District No. 19 has borrowed money on several occasions from the International Union, and District No. 19 received dues from the members under the jurisdiction of District No. 19.

Q. That's right. And, during 1960 you received some substantial funds from the International, did you not?

A. We borrowed money from the International, yes.

Q. How much?

A. I don't recall.

Q. How much did you get in 1961?

A. I don't recall that.

Q. At any rate, the man in Washington that you get the money from is the father of this lawyer?

A. The request for loans, not only from District No. 19 but from other districts, are made through the office of the secretary-treasurer of the International Union.

Q. What I'm getting at is, District No. 19, of which you are the secretary-treasurer, does not take in enough money, therefore it operates by reason of loans se-
543 cured from the International in Washington?

A. Yes.

* * * * * * * *

556 Q. Mr. Pass, what you have told us in substance is that District No. 19 is a provisional district?

A. Yes, District No. 19 is a provisional district.

Q. And the officers there serve under appointment from the International Union?

A. They serve under appointment from the International Union, plus confirmation by the International executive board.

Q. Now, your Mr. Ridings, to which you made reference is in the process of being retired, and Mr. Turnblazer here is taking over as president of District No. 19 as of December 1, is he not?

A. Mr. Turnblazer, as I understand, is taking over as acting president.

Q. Well, acting president instead of president. The functions of the office are the same, though, aren't they?

A. Yes.

Q. Now, Mr. Pass, you have been in this labor organization field for many years, have you not?

A. I've been working for the United Mine Workers since January, 1941.

Q. What I'm getting at, now, your duties, you are not or have not or are not confined to right in Middlesboro, but you yourself actually get out into the field and make talks to the men and aid in the organizational effort, do you not?

A. I go out in the field of every local union in
557 District No. 19, handle grievances, anything that there is to do that I am assigned to do by President Ridings.

Q. Which includes getting local unions together and making talks to them and otherwise, when strikes are in process or have been called?

A. Yes.

Q. All right, sir. Now, the occasions are many where you and Mr. Ridings left Middlesboro and actually went out into the coal fields and while the two of you were there, violence of the worst kind took place?

A. No, sir.

Q. Sir? Meadowcreek?

A. No, sir. Meadowcreek? I was not at Meadowcreek.

Q. But, Mr. Ridings was?

A. I believe that, my recollection, I believe Mr. Ridings was, but I was not there.

Q. But you were at Osborne?

A. No, sir.

Q. Sir?

A. No, sir.

Q. You never went around those mines?

A. No, sir. No, sir.

* * * * * * * *

558 Q. What I'm getting at, Mr. Pass, is that it is the policy of your union, your International District No. 19, that unless there is a contract of a mine with your union, that that mine will not operate?

A. That is not true, because right today Mr. Gibbs is operating a mine over there that is not under contract with the United Mine Workers, and as far as I know, there has not been any effort to organize that mine, none at all.

Q. Now, when you met with Mr. Ridings in your office, or Mr. Ridings' office, there on the 16th, I believe, was it not, and Mr. Turner called you, you talked to him, did you not?

A. Yes.

Q. And Mr. Turner told you at that time the situation that existed in this field here?

A. He didn't tell me the situation existed, I found out later there was more to it than what he said. He told me that he wanted to know where George Gilbert was, and he said that there was a man down there trying to take their jobs. I told him that George was in Middlesboro, and we would get George back down there as soon as we could.

* * * * * * * *

559 In addition to this call from Mr. Turner, the officers of 5881 were up there with you that day?

A. No.

Q. On the 15th?

A. No, sir.

Q. Some of them were?

A. No, sir.

Q. Some of the mine committeemen?

A. No, sir.

Q. Well, what members of 5881 or 7083 were up there?

560 A. The financial secretary of local until 7083 was there.

Q. That's right. Now, his purpose in going up there. Mr. Gilbert's purpose, part of it, was in deciding what to do there, or how you were going to get this contract executed down here in these Tennessee fields?

A. Absolutely not.

Q. You deny that?

A. I deny that absolutely.

Q. Now, Mr. Pass, Mr. Gilbert was there with you and Mr. Ridings, was he not? On the 15th and 16th?

A. Yes, he was there.

Q. And, then and there, at that time, closed in Mr. Ridings' office, the three of you, discussed what to do about this situation right here, did you not?

A. We instructed him, if that is what you mean by discussing, we instructed him to come back down here and talk with those men, find out what was going on, and let us know; to limit the picketing, which was indicated by Mr. Turner, and the other mines that were not affected, that they remain working.

Q. And you have told us on direct examination that you sent Mr. Gilbert, or Mr. Ridings sent Mr. Gilbert, back down here during the day of the 16th?

A. He was—it was right at noon, and as far as I
561 know, he left some time that afternoon.

Q. Now, what steps, if any, did either of you or Mr. Ridings, or to your knowledge any of the other officers up there, take to see what Mr. Gilbert did or did not do when he actually got here?

A. Here's what I did. Mr. Gilbert did call Mr. Ridings and talked to him.

Q. When?

A. I guess a day or so later. I can't recall, because both of us being in on it, we did discuss it. You know there was a strip mine operation over there on Tennessee Consolidated Coal Company's property which was owned by Mr. Everett Roberts and other stockholders of Tennessee Consolidated Coal Company. The men that were not working at the Coal Valley mine wanted to close that mine down because of the Gray's Creek situation, and in my business down here, and in talking to these men, I might say to you that I thought I was going to get whipped two or three times. I had about as hard a time as anybody had keeping that strip mine at work and those other mines, and Mr. Gibbs' two mines, which operated there all of the time. His men going back and forth by those pickets every day. We had quite a time.

Q. When did you get down here, in the fields?

A. I'll say that it was quite a bit after.

Q. Fix the date the best that you can?

562 A. The best I can, I'd say about October.

Q. Then you waited from August until October before you attempted to do anything down here, or come down here?

A. Before I went over to the mines. No, we was in contact with Mr. Gilbert quite often, quite often. He did get a number of pickets down, he did prevent them from closing the other mines, he did have the situation under hand.

Q. Now, Mr. Pass, I want you to explain to this jury:

some of these men that were scheduled to go to work there with Mr. Gibbs on the morning of the 16th of August, 1960, have testified that they were members of the United Mine Workers of America in good standing, members of your union, from whom for 10 to 20 years your union had been collecting dues. Now, those men, this testimony shows, were not permitted to go to work there that morning. Now, would you tell me, sir, what right your union claims to keep those men from going to work there at that mine that morning if they wanted to go to work?

A. Mr. Van Derveer, I couldn't explain to this jury or anyone else who was over there that morning because I wasn't there. I was not there, I don't know who was there.

Q. Now, you also know, Mr. Pass, that some of these same men that were there that morning, and as I have hertofore said, were members of long standing in your union, good dues-paying members, your union has
563 kept from going to work ever since then, specifically for more than two years, and today your union will not let them go to work. That's true, isn't it?

A. Go to work where?

Q. Anywhere.

A. I don't know who was over there, I was not there, I have no idea whether any or all of the people that you refer to were members of the union or ever had been members of the union or ever worked in a coal mine.

Q. Well, let's take this, then. If you take this money from these men for their union dues, and spend it as you have told us here, what steps, if any, do you take to see that your own members are not kept from working by your own union?

A. The steps I take is under the policy, the contract, the constitution of the United Mine Workers of America. If those men are engaged in any action that is in viola-

tion of the law, or a violation of that policy or the contract or the constitution, I take a stand against them. If they have a grievance, under the contract, and if it is justified, I'll represent them and I'll do my best to represent them good in arbitration.

Q. Now, every bit of this difficulty that has happened not only there but elsewhere, with your union, is when your union will not let these men work unless there
564 is a contract on the terms your union wants?

A. Mr. Gibbs is operating a mine right now, as I explained, Mr. Van Derveer.

Q. Mr. Gibbs' mine ran out, didn't they?

A. Mr. Gibbs is operating a mine over at Tracy City, and that mine is not under contract, and as far as I know there is not even a man over there signed with the union.

Q. Do you have any information, sir, whether your Mr. George Gilbert went to an official, specifically a vice-president, of the Tennessee Products and Chemical Corporation, telling them that if the Tennessee Products and Chemical Corporation continued doing business with Mr. Paul Gibbs that the Tennessee Products and Chemical Corporation would have trouble with the United Mine Workers?

A. No, I have no information of that kind, and knowing George Gilbert, I don't believe he would do that anyway.

Q. I see. There is certain testimony in this record that Mr. Gilbert made the statement——

Mr. Kramer: Now, your Honor, I object to counsel repeating what testimony is in the record.

Q. Let me rephrase it this way. What people in high places did you know or did Mr. Gilbert know that could put the pressure on Mr. Gibbs?

A. There's no people in high places that would put any

pressure on Mr. Gibbs, or anybody else, that opens
565 a coal mine. That is their business. That is absolutely their business. That is none of our business. But, over here at Coal Valley those men have been working over there for two generations, they have been told time and time again, and in my presence, by the officials of that company, that when they open that mine over there that those employees would be the ones given the job. There is no industry in that area except coal mining, and it is very poor, I'd say. There have no way to get a job over there, they're isolated. They expected to get the work at that Grundy mine and they did get it and they are working there today, under contract.

Q. Are you saying that Grundy Mining Company has a contract today with the United Mine Workers?

A. That mine is under contract, yes.

Q. Do you have a copy of that?

A. No, I don't.

Q. Where is it now? I want this jury to see it.

A. The mine was signed up by Allen & Garcia Company and they went to work——

Q. Isn't Allen & Garcia over there today?

A. There were over there when the mine opened and they never cancelled it.

Q. Are they over there today?

A. They got Grundy operating for them.

566 Q. Mr. Pass, you know just as well as I do that there is no contractual agreement between Grundy Mining Company and the United Mine Workers?

A. I assure you, Mr. Van Derveer, that that coal company would not pay the scale, they would not check off the dues of those employees, if they weren't under contract with the United Mine Workers, and they are doing that.

Q. And it is your testimony they are under contract with them?

A. Yes, sir. Allen & Garcia opened that mine and they never cancelled the contract.

Q. I'm asking you now, sir, is it your testimony that there is a contract between the United Mine Workers of America and Grundy Mining Company?

A. And the Grundy mine, yes.

Q. I'm going to ask you, sir, if you can produce that contract?

A. Signed by Allen & Garcia Coal Company. Yes.

* * * * * * *

567 Q. These men had told you or your union had told these men, that if Gray's Creek mine opened, that the union would see that certain particular ones got those jobs?

A. That's not true, no.

Q. Well, isn't that what you testified?

A. No, sir, I did not.

Q. Didn't you say that statement was made in your presence?

A. I said that they said that when they opened—the officials of Tennessee Consolidated Coal Company said in my presence many times that when they opened that mine at Gray's Creek, that the Coal Valley men would be the ones that would get the jobs over there.

Q. And the United Mine Workers of America were going to back that up if it took blowing up half of Tracy City?

A. Mr. Van Derveer, for your information, Albert Pass and the officials of the United Mine Workers of America absolutely don't condone blowing up nothing. It takes the members of the United Mine Workers to want a standard of living for their wives and children, and we believe through the United Mine Workers of America that that is the way to get it, not blowing up something.

568 Q. Do you think $26 a day is not a liveable wage?

A. I think $26, $26.68, $26.21 over there, is what is provided for by the contract, is what I think.

Q. And is it your testimony to this Court and this jury that to your knowledge there has not been a reign of violence over there for months?

A. Sure, there has been trouble over there, Mr. Van Derveer, but not—I had not nothing to do with that, and I wouldn't have nothing to do with it, under no circumstances, and our union wouldn't direct anybody to do that.

Q. Including Mr. George Gilbert?

A. Including Mr. George Gilbert.

Q. Or Mr. Howard Maybry, who was your president at Riley before you sent him down to this area?

A. He could have been president of the local union up there, I don't know that.

Q. And, Howard Maybry was in that violence up there?

A. Up where?

Q. In this dealing with the Osborne and Meadowcreek situation?

A. He was not, he was not.

* * * * * * *

Redirect Examination,

By Mr. Owens:

569 Q. Mr. Pass, do you know or do you recall Allen & Garcia didn't serve notice to cancel their contract prior to their terminating their relationship with Tennessee Consolidated?

A. They served notice to cancel the contract at the Coal Valley mine, which fell in.

* * * * * * *

Mr. Owens: Mr. Van Derveer has asked about whether they have had contracts or not, and that is a legal ques-

tion that is involved, and I want to establish the facts as to what the situation is now.

Q. Do you know, or received any notice, from Allen & Garcia, serving the 60 day notice cancelling their contract, that wuld be given in August of this year?

A. As far as I understand it, the termination only affected the Coal Valley mine, not the Gray's Creek mine.

Q. Well, the Coal Valley mine is not operating, is it?

A. That's right.

Q. When did Grundy Mining Company take over the operation of the Gray's Creek mine?

A. I think it was in September, somewhere along in
570 September after Allen & Garcia opened it up and built the buildings down there, then Grundy Mining Company—the information I got, started operating.

* * * * * * * *

Q. Will you explain how the men would be employed at the Gray's Valley mine in accordance with their seniority in accordance with this system of panel?

A. I might say to begin with, when the Allen & Garcia Company reopened the Coal Valley mine, that it was the insistance of the employees, the members of our union over there that they start at the top of the list of names, regardless of the age or the qualifications of the employees to be re-employed, and that was agreed upon by the
571 management and the committee and officers of the local. Well, we run into some difficulty on it. For example, on operation of a shuttle car a 58 year old man cannot be trained, unless he is exceptionally good, to operate a shuttle car, because of his reflexes and his knowledge of running it. So, what we did, we set down with the committee, the district officers, and I was there, and the officials of the company, and we amended that, that the company would take off of the panel list that they desired

to train or to put to work on a job that they already knew how to do. Then, when the mine fell in at Coal Valley and they opened up the Gray's Creek mine, the company chose the employees that they wanted to work from that panel list and put them to work over at Gray's Creek, and they are working there today. Now, the remainder of the employees that is on that panel list would be called to work when vacancies occur in that mine according to their qualification or according to the training program agreed upon between the company and Mine Workers.

Q. How many UMW members in that area that were not put to work, approximately?

A. I'd say there is in the area at least 400, and that would be low.

Q. Let's limit it to the Tennessee Consolidated Coal Company, employees of the Tennessee Consolidated Coal Company?

A. I'd say there—there was 115 on there to start
572 with, that's on the one when they closed down. They had another panel that consisted of 175, that would be 290. They have got working now, as I understand it, I believe I'm correct, about 40. That includes, as I understand it, the truck drivers. Maybe they don't have 40, maybe if I would say 35—somewhere in that vicinity.

Q. Directing your attention now to August of 1960, did the union take any steps or order any picketing or any activity to prevent any member from going to work in the Gray's Creek mine?

A. Absolutely not, we most certainly did not.

Q. Did they take any steps to prevent not only members or any person from going to work at that time?

A. No, sir.

Mr. Owens: That's all.

Recross-Examination,

By Mr. Van Derveer:

Q. Now Mr. Pass, this contract which you keep referring to, you know was for the Coal Valley mine, and the Coal Valley mine only?

A. No, they signed that contract, and they said any mine, at the time they signed it, plus the others that they opened on that branch, that these men working for them in Coal Valley would be the people for the jobs. They opened the Gray's Creek mine, and they took the
573 men over there from the Coal Valley mine.

Q. Then it is your position, the position of your union here in this case, that any mines that were opened over there anywhere for Grundy had to be run according to the way the union said run them on a contract made for Coal Valley?

A. No, no. I'd say if a mine opened up over there, there would be agreements made with the management of the Tennessee Consolidated Coal Company——

Q. Now, Mr. Pass——

A. Yes, sir.

Q. Under Mr. Owens' questioning here you have told us that you did meet on this Allen & Garcia deal. Where did that meeting take place?

A. We had the meeting in the office of the Tennessee Consolidated Coal Company at Palmer, Tennessee.

Q. Now, when was that meeting and who was there?

A. That meeting was held on—it was in June of 1961, and I was present and Mr. Gene Ford, Mr. Bradley, and Mr. Kennedy, representing the——

Q. Now, on——

A. Let me finish. Albert Pass and Howard Madewell and J. W. Ridings representing the United Mine Workers.

Q. Now, at that time, this Grundy mine was still not in operation, was it?

A. No, sir.

574 Q. Then, what you have done, Mr. Pass, for your union, you all had kept that mine from opening on the 15th and 16th of August, 1960, and here in September of 1961, until they met your terms, it still wasn't opened?

A. I repeat again, Mr. Van Derveer, you're wrong, we did not do that. We did not do that.

Q. You took advantage of it, didn't you?

A. There was no advantage for me to take. The men at Coal Valley were told many times that those jobs were theirs, that we couldn't even control them ourselves, let along anybody else. I told you they jumped on me, and when I tell you they jumped on, they jumped on heavy.

Q. Now, look, Mr. Pass. You didn't want those mines at Gray's Creek run by anybody unless it was under the National Bituminous Wage Agreement, a copy of which is right here. That is what you wanted, isn't it?

A. Mr. Van Derveer——

Q. Will you answer the question? Is this what you wanted, is that what you were looking for?

A. That or better.

Q. That or better. All right. Now, at that time, you have told the jury you wanted this or better, the United Mine Workers of America was not a certified labor union within the meaning of the use of the National Labor Relations Board facilities, was it?

575 A. The end of '59?

Q. No, sir, when you wanted this? The 15th and 16th of August, 1960?

Mr. Owens: Your Honor, we object to the question——

A. We want that contract everywhere, I don't know what you are getting at, or whether you're trying to get me to mislead this jury or not. If I can help it I'm not going to do it.

Mr. Owens: Whether the union is certified or not is immaterial to any issue in this case. The union has a perfect right to represent these employees in collective bargaining without having to be certified by the National Labor Relations Board. That is an added protection that they can ask for if they want to. They need not do that to represent these employees.

Mr. Van Derveer: Now, our position on that is that a labor union, including this one, most assuredly does have a right to represent the employees provided, however, they represent the majority of the employees. But, that we do not have here, and this man has testified that "yes, sir" we want this everywhere.

The Court: Well, let's reserve argument of the case until the close of the testimony. Disregard, of course, statements of counsel as to matters, factual matters.

576 Rather, those matters must be established only by witnesses in the case.

Q. Now, at the time that you and Mr. Ridings, and you say you met along with Mr. Fitzgerald and several other officials of Allen & Garcia in the office of Tennessee Consolidated Coal, in September of '61——

A. When?

Q. Well, when was it?

A. That was in June of 1960.

Q. June of '60?

A. Are you talking about what we just got off of or are you asking another question?

Q. No, just what we got off of, if that will clarify——

A. We met with them—no, that's right, June of '61. The contract was cancelled in March of '60 and we met with them in about June, as I recall, of 1961.

Q. And you met with Allen & Garcia about this contract, how to work it?

A. Yes.

Q. But, Mr. Pass, you have heretofore told us——

A. That's for Coal Valley.

Q. Yes, but you have heretofore already testified that there was already a contract. Now, if there was already a contract, tell us why, sir, you were meeting regarding the execution of one?

577 A. The contract we met with over there was in reference to that contract and excuting, with them, the provisions of the understanding that we then had with Tennessee Consolidated Coal Company on the seniority of those men.

Q. Which means, sir, that you did not have a contract for Gray's Creek nor any area, and that is what you——

A. I testified that that contract, as I recall, when that mine was opened, as I recall, was about May 23rd, 1961. Now, at that meeting I was not present, but I was present at the meeting, I believe it was in June, the latter part of June.

Q. Of '61?

A. Of 1961.

Q. All right. Now, from the 15th or 16th of August, 1960, up through and until the time of this meeting that you are now talking about, in June of 1961——

A. That's on the Coal Valley mine.

Q. The 15th of 16th of August, I'm speaking of Gray's Creek. The 15th and 16th of August until June of '61, no coal was mined at the Gray's Creek mine?

A. Oh, no, they hadn't even started underground at the Gray's Creek mine. I was down there after that.

Q. And, all of that time, from the 15th and 16th of August, '60, 'til June of '61, the time of this meeting you have told us about, your union sent funds down here to help aid and assist the people on the picket line,

578 described as what you call, relief for distressed members?

A. We sent no funds down here. We issued vouchers payable to the grocery stores for food and food alone to those coal miners and their wives and their children that were members of the union.

Q. Now, all of that time——

A. Once a month, after, I'd say, a couple of months, as I recall, we did give them a check, each member, so they could pay their lights and house rent and drugs, shoes for his children, something like that.

Q. Whether it was strike benefits or relief for distressed members, the purpose was to keep that picket line up there in front of or at the entrance of the road going to the Gray's Creek mine?

A. The purpose was that those men were on starvation, and those families. That picket line received nothing, absolutely nothing, from District 19, United Mine Workers of America.

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579 **Redirect Examination,**

By Mr. Owens:

Q. When Allen & Garcia began operating the Coal Valley mine, they executed a new contract—did they execute a new contract with the United Mine Workers of America?

A. They did.

Recross-Examination,

By Mr. Van Derveer:

Q. Well, now you've got me confused. You have told Mr. Owens there was a contract for the Gray's Creek mine, you have told me there wasn't. Now, was there or wasn't there?

A. He didn't ask me that.

Q. I'm asking you, sir. Was there or wasn't there?

Mr. Kramer: Your Honor, I believe counsel either misunderstood Mr. Owen's question—there is a misunderstanding here, because you started out with your question, you told Mr. Owens one thing and me another. Now, the witness, I don't think, did any such thing.

Mr. Van Derveer: I think he did and I think the jury heard it. Let me see if I can clear it up.

Q. Let me put it this way. On the 15th and 16th of August, 1960, for the area that was then and now known as the Gray's Creek mine, did the United Mine Workers hold a collective bargaining agreement of any kind
580 or description with the Grundy Mining Company or Mr. Paul Gibbs?

A. No.

* * * * * * * *

581 **GEORGE GILBERT,**

having first been duly sworn, testifies as follows:

Direct Examination,

By Mr. Owens:

Q. Will you state your full name, please.

A. George Gilbert.

Q. Where do you live, Mr. Gilbert?

A. I live in Middlesborough, Kentucky.

Q. How old are you?

A. 60 years old.

Q. And what do you do?

A. I'm representative of the United Mine Workers of America, District 19.

Q. And how long have you held that job? A. The present job that I have now, I've held since April 28, 1953.

Q. Are you assigned an area as field representative of District 19?

A. Yes, sir, I am.

Q. And what area are you presently working?

A. At the present, Bell County, Kentucky.

Q. And how long have you been there?

A. I've been there since March 27th, 1961.

Q. And where were you prior to that?

A. In southern Tennessee, in Hamilton County,
582 Marion County, Grundy County, Sequachie County, Van Buren County and a little bit in Rhea County.

Q. And what years were you assigned to that area?

A. I was assigned to that area April the 28th, 1953.

Q. All right. Will you tell us what the duties of the field representative?

A. Well, the duties of the field representative is to organize the unorganized, settle grievances where the mines is under contract, keep the mines working according to the contract.

Q. All right. Mr. Gilbert, you were working then in the Grundy area in August of 1960?

A. I was.

Q. Where were you on April 15th and 16th of 1960?

A. April?

Q. August. 15th and 16th of 1960?

A. I was in Middlesboro, Kentucky.

Q. When did you go there? What day?

A. I went there on the 14th, on a Sunday. I stayed at Davidson on the 13th.

Q. You went there on the 14th?

A. 14th.

Q. And who did you go with?

A. I went with Bryan Parmlee, or he went with me.

Q. And who is Bryan Parmlee?

A. Bryan Parmlee is the secretary of Local 7083
583 over in Marion County.

Q. Will you state your purpose in going to Middlesboro, and what you did there, and when you left?

A. Yes, sir. The purpose was to attend a board meeting on the 15th, and other business on membership, hospital cards for our members, different things.

Q. All right. Will you explain what you mean by the board meeting?

A. The board meeting is a routine that happens very often, of all the three executive officers of the district and all the field workers.

Q. Do you call this the district executive board?

A. Yes, sir.

Q. What is the function of that board?

A. The function of that board is to take care of people that's membership's in question and cases that have not been settled according to the contract, different things.

Q. How often does that board meet?

A. Well, it don't meet on any regular schedule. It meets sometime once a year and sometimes twice, according to what they have on hand.

Q. Now why was Bryan Parmlee with you?

A. Bryan Parmlee was the financial secretary of Local 7083, that had a large membership—around 600 working members at that time—and at all times he had men
584 that their hospitalization was in question for some cause or other, and men that their dues hadn't been credited at the right place, that was about his business up there.

Q. Well, who would he check this with in District 19?

A. He checked that with the office girl who worked under the secretary-treasurer, who keeps the records.

Q. Had he gone with you to Middlesboro prior to this at any time?

A. Yes, sir. It was regular routine, because he was the secretary of the largest local union, and he'd let his work pile up to go with me because he didn't have a car and couldn't drive a car. He's always getting transportation

because from down here up there, the transportation is real tough. You have to ride the bus.

Q. All right. Where did you stay in Middlesboro?

A. I stayed the first night at the Majestic Hotel, and then it was hot weather and they didn't have an air-condition, and I moved over to Middlesboro Hotel on Monday morning at 7 o'clock, on the 15th.

Q. All right. Did you have a discussion with President Ridings or Secretary Pass in regard to picketing activities that had occurred at the Gray's Creek area?

A. Yes, I did.

Q. Will you tell about that?

A. Well, on the Tuesday up around noon time I
585 was working downstairs with the bookkeeper and Mr. Ridings called me and told me him and Pass wanted to talk to me before I left. And about noon time we had the discussion about it. Somebody had knowed this item, that there was some picketing at Gray's Creek. And we discussed it and they instructed me to go back to Marion County and see that the picketing didn't spread to any other mines, whatsoever. And also to cut the picketing down to a reasonable picket, a reasonable size picket.

Q. Now, how many other mines were there in that area?

A. Oh, there was a number of them. In that pocket area, there was approximately—I believe on the Palmer, on this Tennessee Consolidated side at that time, there was 11 different mines, and on the left side of the pocket creek, there was approximately 5 or 6 mines still running, still operating.

Q. All right. Now what time did you leave Middlesboro?

A. I left Middlesboro sometime around one o'clock or a little after.

Q. And you drove home from Middlesboro?

A. Yes, sir. I drove to Jasper.

Q. How long does it take you to get home?

A. Well, reasonable driving, it'll take you about 4 hours and 15 minutes.

Q. And what time did you get home?

A. I got home around 5 o'clock or a little after.

Q. Well, did you have a conversation with Mr.
586 Gibbs, a telephone conversation with Mr. Paul Gibbs, about this incident that occurred on the 15th and 16th?

A. I didn't have any telephone conversation with him about the picketing. Paul Gibbs called me.

Q. Well, first, when did he call you?

A. Well, he called me either the 17th or the 18th.

Q. All right.

A. It was right after I returned home from Middlesboro.

Q. All right. What was said in that conversation?

A. Well, Paul asked me—told me that he had lost a pocket gun that some of his folks had gave his wife. And he was sure that I could get it back for him. And I told him that I didn't know anything about his gun. If I did, that I'd certainly get it back for him. And that's all we talked about.

Q. Well, did he say where he lost this gun?

A. Yeh. He said he lost the gun up there at Gray's Creek road.

Q. Well, now, Mr. Gilbert, did you tell Mr. Gibbs in that conversation—or any words to this effect—"I want you to——

Mr. Van Derveer: May it please the Court. Leading, to which we object.

The Court: Overrule the objection.

Q. "I want you to keep your hands off that Gray's

Creek mine and the southern labor union. We don't intend they work that there mine."

587 A. I most certainly did not tell Paul Gibbs any such. I never mentioned the southern labor union or Gray's Creek to Mr. Gibbs.

Q. All right. Did you have a conversation—first place, how long have you known Mr. Gibbs?

A. I knowed Mr. Gibbs for a number of years. I was down in that area for—well, I went down in that area in November the 5th, on election day, 1946, with District 50, and I learnt Mr. Gibbs—he was in the trucking business—I learnt Mr. Gibbs some time in the late fall of 1946.

Q. Well, from 1953 on, while you were field representative of District 19, did Mr. Gibbs operate a number of mines in your territory?

A. He did.

Q. Were those mines under contract?

A. They was.

Q. Now, in August of 1960, was he operating any mines?

A. Yes, sir. He was operating number 59 mine in August of 1960, and he may have had two or three men in number 58 mine in the pocket. I wouldn't say for sure whether the 58 was worked out in 1960 or not, but I know that 59 was working.

Q. Are you sure about those numbers? That's the number designation of the mines?

A. Yes, sir. I'm pretty sure about that.

Q. But he was operating two mines?

588 A. Well, while I was there from 19 and——

Q. Well, I mean in August of 1960, how many mines was he operating?

A. Well, I believe he was operating two. I know he was operating one.

Q. Were these mines mechanical mines or were they hand-loading mines?

A. No, sir. They were hand-loading mines. This mine that I know he was operating in 1959 he had a motor and that's all the machinery that he had beside the fan, furnished there for the men.

Q. What is the difference between a hand-loading mine and a mechanical mine then?

A. Well, the difference in those mines—they was shooting this coal from the solid. And they load these with a shovel and they push the cars in from the main line where the motor push the cars up. They push them in by hand and push them back out by hand and load them with a shovel. And if they put in a round of shot like yesterday, and the shot didn't do any good, they wouldn't load but a small amount of coal today. It all depends on how the round of shot done and pulling in the coal, how much they load.

Q. And how is that different from a mechanical mine?

A. Well, it differs from a mechanical mine is undercut and shot down and loaded by machinery. They have air sufficient that they can cut and shoot again all dur-
589 ing the day, but in these solid mines you can only shoot at quitting time because you can't go back on the smoke.

Q. Does it take skilled men to operate these mechanical cutting machines and loaders?

A. Very much so.

Q. Do you know a Jim Campbell?

A. A Jim Campbell? Yes, I do.

Q. Who is Jim Campbell?

A. Well, Jim Campbell is a—he was in the coal trucking business and also operating some small mines at times.

Q. Well, did you have a conversation with Jim Campbell on August 17, 1960, or August 18th or some time in there?

A. Yes, sir. I talked to Jim Campbell. He came to my home—I think it was on August 18th.

Q. Well, tell us about that.

A. Well, I live right on side of the highway and my driveway came right off the main highway. I was sitting in my living room and I saw Jim pull in my driveway and he blowed his horn. I didn't go out. I had my wife to tell him to come in and he did so. When he came in he said, "Well, our old friend Paul Gibbs has got in trouble with the southern labor union and ruining himself." I told Mr. Campbell I didn't want to discuss the southern labor union nor Paul Gibbs. And that ended the conversation. He left and got in his truck and left.

Q. Was there anybody else present there besides Mr. Campbell and yourself?

590

A. My wife was present.

Q. Well, I ask you if you told Mr. Campbell that the union wouldn't let Mr. Gibbs do it—that is, operate this mine or open this mine?

A. I told Mr. Campbell that I didn't want to discuss the southern labor union nor Paul Gibbs, and that was all that was said.

Q. Did you make any statement that you had friends in high places that could move Gibbs out of the mining business?

A. I did not.

Q. Now, do you know a man named Sam Swope? S-w-o-p-e.

A. Sam Swope, I do not know.

Q. Do you know anybody by a similar name or that works for their power equipment company?

A. I don't.

Q. Now, did you—was there pickets at the—what do you call it—the Gray's—the intersection of the Gray's Creek Road and the Pocket Road after August the 16th?

A. After August the 16th there was pickets at the Gray's Creek Road, that's known as the Dogwood Flats.

Q. And how long did that picketing activity go on?

A. Well, it went on several months. It was there when I left the area.

Q. Did you ever engage in that picketing yourself?

591 A. I did not.

Q. Did you ever stop at that picket line?

A. Yes, sir.

Q. What would be the occasion for you to do that?

A. Well, an occasion would be that I would be passing this picket line and it was obligation to stop because you'd a had trouble if you hadn't stopped. I'd stop and pay 'em a friendly visit and go on.

Q. Well, they—now, we've used a word "picket line." Did they have a line across the road or anything like that?

A. No, sir. It was picketing. They had a little shack there on some private property and they stayed around that little house there.

Q. And that was off to the side of the road?

A. It was off to the side of the road on some private property.

Q. All right. Now, on August the 22nd did some man stop at that picket line while you were present there and ask your permission, call you out of the woods, and ask your permission to go through any picket line, and you made the statement that to tell your boys or your men to let him go on through?

A. No, sir. Not on August 27th or no other date.

Q. 22nd I said.

A. No, sir. And nobody asked me anything about going through because there was nobody being stopped.

592 Q. You don't recall any Sam Swope at all?

A. I don't.

Q. Well, did any person—were you ever there when any person, this Sam Swope or anybody else, asked your permission to go through any picket line?

A. I was not.

Q. What kind of automobile did you own at that time?

A. What kind of——

Q. Of an automobile? Did you own a black Pontiac?

A. No, sir. I never owned a black Pontiac in my life. At that time I owned a black with a white strip across the back end of it—a black '59 Pontiac—I mean Oldsmobile.

Q. All right. Now, did you do anything—did you follow the instructions of Mr. Ridings and Mr. Pass about what you were to do in regard to this picketing?

A. Yes, sir. I did to the letter.

Q. What did you do?

A. I came back in the area that I was responsible for and I called all the people that I knew that was leaders of that particular local union 5881 and arranged to meet them either at my home or at their home and I laid the plans for the pickets to be cut down to three—three pickets. It took me a few days to get that in progress, but in a few days I did have it cut down to three pickets. Now, that don't mean that there was just three men there at that shack at all times, because there was people that
593 didn't have no work and farmers and different people that knowed those boys would stop there and hang around. There was no way for 'em to get rid of 'em. But I got the pickets cut down to three on different shifts. They stayed at 24 hours there.

Q. Did any of the other mines shut down?

A. No, sir. I had quite a hard time keeping the other mines running, especially Paul Gibbs, but I was successful in keeping all other mines operating. And that was the instructions from Mr. Ridings and Mr. Pass.

Q. Was Mr. Gibbs' mine ever shut down during this period of time?

A. Never was shut down at all.

Q. Did they continue to operate or continue to work until they ceased operation?

A. They did. They was working when I left the area.

Q. Did you ever see any mine foreman or superintendents at this shack where these pickets stay?

A. Yes, sir, I have.

Q. Who were they?

A. Well Mr. Everett Roberts, I saw him there.

Q. Well, is he a mine foreman?

A. He was the vice-president then in charge of the operations, I believe, of the Tennessee Consolidated Coal Company at that time. I know he was a vice-president then and he was in charge of the operation on their property.

594 Q. All right. Now, how about mine foremen and superintendents?

A. I saw the superintendent who was named Fred Marshall and I saw him there. I saw Everett Roberts, Jr. there. And I have saw—they had about 15 other foremen at the Coal Valley Mine, that's the mine we shut down—I saw some of them there off and on all during that time, but I don't recall the names at the present time, but I know I saw them.

Q. Well, identify the people then who did the picketing. Who were these people? Who were these men?

A. The men that was picketing was employees of the Tennessee Consolidated Coal Company, and had been working at the Reals Coal Mine, the mine that cancelled its contract and closed down. And they were employees that had been promised the jobs at this Gray's Creek opening.

Q. And what local union did they belong to?

A. They belong to 5881, Palmer.

Q. Did you ever see any food at that shack?

A. Oh, yeh. They had food at all times.

Q. Where did this food come from?

A. Well, the food—they designated the man to handle that, and the most of it was handled by a fellow by the name of Brewer, who was the financial secretary of that particular local.

Q. Well, did the local union buy the food?

A. The local—at first, there was quite a few op-
595 erators, foremans that worked at the Coal Valley Mine, merchants, the whole community was behind these boys. They thought they was within their rights for holding out for that job, and they give them food from all stores, grocery stores in that area, and they gave money—operators, politicians, everybody that passed was in sympathy with them and kept them going.

Q. Well, did District 19 supply them with any food or any other items?

A. Nothing at all, at the pickets.

Q. Did you ever deliver any food to that picket line?

A. I never did.

Q. And how long did that picketing go on?

A. Well, it went on for several months. It was still going when I left there in March, 1961.

Q. Do you know if District 19 furnished any aid to any of these employees?

A. Yes, sir. They furnished them aid, starting sometime in November to——

Q. November of what year?

A. November, 1960. To the people that they investigated and found them to be badly in need, their family. They furnished them some groceries.

Q. Well, describe how that was done?

A. Well, the—Albert Pass and others, myself, we in-
vestigated everybody applied for relief and then
596 passed it on to Mr. Ridings from Mr. Pass. And they discussed it between theirselves and order

was wrote to certain people in Middlesborough and mailed to me or either brought to me in person, and I passed them out at the local union hall to the people that they wrote for. And they took them to certain merchants in the area, traded them, and then I picked them up from the merchants, took them to Middlesborough or either sent them to Middlesborough and got the check for them, and then delivered the checks.

Q. Now, Mr. Gilbert, did you authorize or instruct or ask any one to engage in any picketing in that area in August—on August the 15th or 16th of 1960?

A. I did not. I didn't know there was any such thing coming up.

Q. Did you know that there was such a company as the Grundy Mining Company?

A. No, sir. I didn't know there was such a company. I had heared Paul Callis say in a meeting at the Patten Hotel down here some time prior to that that they might operate under the name of the Grundy Mining Company. But at that time, I didn't know there was such a company.

Q. Did you know that they were going to open the Gray's Creek Mine on August the 15th, prior to its opening?

A. I did not. If I had, I wouldn't have been in Middlesboro.

Q. Now, do you know a man named John Higgins?

597 A. John Higgins? I do.

Q. Who is John Higgins?

A. John Higgins is a coal miner who grew up in that area, mined coal several years there. He was gone for a while, come back and mined coal again.

Q. Did you ever visit his home with John Morrison?

A. Yes, sir. I was at his home one time with John Morrison. John Morrison came while I was there.

Q. All right. Tell about that visit, the conversation that you had.

A. Well, John Higgins was in some trouble and he kept sending for me to stop. He knowed that I passed his home every day. He kept getting people to tell me to stop and see him. And this particular day I did stop.

Q. Now, was this—you say he got into some trouble—now was this union trouble?

A. No. No, he was in trouble himself.

Q. Did he tell you what the trouble was?

A. Yes, sir. He was in a murder case, and that's why he wanted me to stop. The murder trial was scheduled to come up and he wanted my assistance to help him. That's what he wanted.

Q. Well, was he the defendant in this murder trial, or was he a witness, or what was it?

A. No, he was the defendant.

Q. Is this the discussion that you had?

598 A. It was.

Q. Now when was this?

A. Well, it was sometime in the year of 1959.

Q. Do you know the exact date in any way?

A. No, I don't.

Q. But it was prior to August of 1960?

A. Several months.

Q. Did you ever visit his home after that?

A. No, sir. I never did visit after that. I visited once before that.

Q. Did you ever have a conversation with John Higgins either at his home or any place else in which you said, "Hell, we can't let that go on. Everything would go like that. Paul was trying to bring in the southern labor union, and we are not going to let them get by with it."?

A. I certainly did not, because I wasn't scared of the

southern labor union. Our people were satisfied. There was no union could bother us in there.

Q. But you're sure you never had that conversation——

A. I did not. I certainly did not.

Q. Now when did you—what was the date that you left this southern Tennessee area?

A. You mean, went out for good?

Q. Yes. When you were transferred to Kentucky?

A. The 27th day of March.

599 Q. And who took your place?

A. Howard Madewell.

Q. How do you spell his last name?

A. M-a-d-e-w-e-l-l—I believe. M-a-d-e-w-e-l-l.

Q. Did you ever contact any operator, coal operator, and ask them or suggest to them that they not hire Mr. Gibbs, either as mine foreman, or that they not lease him any property?

A. I certainly did not.

Q. Did you ever ask him to cancel his leases?

A. I did not. I always get along with Mr. Gibbs fairly good. I would have had no reason to have did that.

Q. And the contract that Mr. Gibbs had had a cancellation clause in it that the United Mine Workers could cancel his contract?

A. It did.

Q. How much notice would they have to give him?

A. 60 days.

Q. Did they ever give him any 60 days notice canceling the contract?

A. No. Not to my knowledge.

Q. Did you mention a Reals Coal Mine, Reals Coal?

A. Here today?

Q. Yes.

A. If I did, it was an error. If I did, I meant Coal Valley Mine.

600 Q. What is the Reals Coal Mine?

A. The Reals Coal Mine is a mechanical mine or was. It's worked out now. Closed down. It was a mechanical mine over on the Whitwell side on the Tennessee Products and Chemical.

Q. The mine that you were talking about at Tennessee Consolidated was the Coal Valley Mine?

A. Correct.

* * * * * * * *

Cross-Examination,

By Mr. Van Derveer:

* * * * * * * *

Q. Mr. Gilbert, you are what is commonly referred to as a union organizer, are you not?

A. I am a representative of District 19.

Q. Well, that's a union organizer?

A. If you want to call it that.

Q. Now, you took Mr. Bryan Parmlee up there. This was not the first time; Mr. Parmlee had made this
601 trip up there with you a number of times, had he not?

A. That's right.

Q. And, of course, you and Mr. Parmlee both knew of the situation that existed over in Gray's Creek?

A. Did not.

Q. You deny that?

A. Deny that.

Q. Now, you met with Mr. Ridings, I believe, and Mr. Pass there in Middlesboro about the situation that existed here, did you not?

A. I did.

Q. And you told us now that you arrived back here on the 16th?

A. 16th.

Q. And on the 16th you talked to Mr. Jim Campbell?

A. No, I didn't say that.

Q. Well, when? The 17th?

A. No, sir. I said I believed it was the 18th.

Q. But you do admit talking to him?

A. I did.

Q. And you told this jury that he walked into your house. You made one statement. Mr. Campbell made one statement, and he left. And that's all?

A. Yes, sir. I told what occurred.

Q. Do you know Mr. W. F. (Woody) Travis?

602 A. I do.

Q. Who is Mr. Travis?

A. Well, at that time Mr. Travis was the general superintendent of Tennessee Products and Chemical Corporation, Mining Division.

Q. Who at that time had in operation the Reals Coal Mine?

A. He had Reals Coal Mine and several small mines.

Q. Yes, sir. And you and Mr. Campbell, on the 17th, the day after you got back, went and talked to Mr. Travis about Mr. Gibbs?

A. I didn't see Mr. Campbell on the 17th.

Q. All right. Let's make it the 18th as your testimony. Is that when you went to see Mr. Travis?

A. We didn't go to see Mr. Travis never.

Q. Now, I want you to think before you become too positive on that, Mr. Gilbert.

A. I——

Q. I'm going to ask you the specific question now and it's your testimony——

A. I——

Q. That never at any time did you, accompanied by

Mr. Jim Campbell, ever go and see Mr. Travis about cancelling the leases of Mr. Gibbs?

A. Never. No, sir.

Q. That's your testimony?

603 A. That's my testimony.

Q. All right. Now, you will admit, however, that Mr. Travis did call you on the 18th, did he not?

A. No, sir. I said that he either called me a day or two after I returned. When I first came back, I had a call in on my desk—my wife had on my desk——

Q. From Mr. Travis?

A. To call Mr. Travis. I didn't call him. And a day or two later, he either called me or I saw him in Whitwell and talked to him personally, and I don't recall which one it was.

Q. Now at that time, your union, the United Mine Workers, did have a contract with Mr. Travis' company, Tennessee Products, did they not?

A. Yes, sir.

Q. That's correct, isn't it?

A. Yes, sir.

Q. All right. And Mr. Travis—you say you either met him or talked to him on the phone?

Q. One of the two. I don't recall which way it was.

Q. All right. Now what was the purpose of either meeting Mr. Travis or talking to him on the phone?

A. Mr. Travis was, of course, worried about his own mines, about this trouble, and he wanted to—everytime I saw him, he had something to talk about because he had a sizable operation at Reals Coal and a number of small mines that he was interested in, which one

604 of them was operated with Mr. Gibbs.

Q. In other words, Mr. Gibbs had a lease from the Tennessee Products?

A. That's right.

Q. And you were talking to Mr. Travis about Mr. Gibbs' lease?

A. No, sir. Never did.

Q. Didn't do that?

A. I never talked to Mr. Travis about no one man's lease.

Q. All right. Then tell us what you were talking to Mr. Travis about?

A. Mr. Travis wanted to talk to me about several things. I don't recall all of them, but I do recall Mr. Travis saying Mr. Gibbs, Paul Gibbs, had got the whole area in an uproar.

Q. And did you tell him to get rid of Paul Gibbs' lease?

A. I did not.

Q. All right, sir. Go ahead.

A. And he also said while he were talking to me that he was gonna get rid of Mr. Gibbs. That he had been watching for him, and he was gonna get rid of him.

Q. All right. Now, now we're getting down to the meat of it. Isn't that when you told him——

Mr. Owens: I object to that comment of counsel.

Mr. Van Derveer: Well, I think maybe so. You will——

The Court: Just a moment now. Ladies and gen-
605 tlemen, disregard the statements of counsel. It's not proper at this stage of the case for counsel to argue the case or draw opinions or conclusions.

Mr. Van Derveer: I think that's right. To the Court and jury, I apologize.

Mr. Owens: I ask counsel to be careful.

Mr. Van Derveer: I apologize—But you did talk to Mr. Travis about getting rid of—You either talked to Mr. Travis about getting rid of Paul Gibbs or Mr. Travis talked to you about getting rid of Paul Gibbs?

A. Mr. Van Derveer, Mr. Travis told me that he was going to.

Q. Now, the only interest that you had in doing business with Mr. Travis was in seeing that your contract with Mr. Travis was properly carried out. That's your only interest in it, wasn't it?

A. Yes, sir. That was the only interest I had in Mr. Travis.

Q. Then what are you talking to him about Mr. Gibbs for?

A. I didn't talk to him about Mr. Gibbs. I told you, Mr. Van Derveer, that he talked to me about Mr. Gibbs.

Q. Now you know Sam Swope, don't you?

A. I do not know Sam Swope, no, sir.

Q. You never saw Mr. Swope?

A. If I did, I didn't know him. I don't know Mr. Swope.

606 Q. And you're telling this court and jury, now, that you did not see him over there on a picket line that day?

A. I'm telling this honorable court that I don't know Mr. Swope.

Q. But you will also—in issuance out of this conversation with Mr. Travis—You had some further conversation with Mr. Travis, now, you haven't told us about in regard to you meeting Mr. Gibbs, didn't you?

A. No, sir. I did not.

Q. Now, Mr. Gilbert, didn't Mr. Travis call you and try to get you to meet with Mr. Gibbs and settle this Gray's Creek thing?

A. No one never mentioned any settlement between me and Mr. Gibbs, not even Mr. Gibbs never mentioned settling anything to me, nor I never talked to Mr. Travis about it.

Q. And didn't Mr. Travis even go so far as to arrange a meeting place for you and Mr. Gibbs?

A. Never did.

Q. And you didn't show up?

A. There never was such a meeting arranged with me.

Q. And when you didn't show up, didn't Mr. Gibbs call you and wanted to know where you were and why you didn't show up?

A. Mr. Van Derveer, I'm telling you that there was never no such a meeting arranged.

Q. All right. But Mr. Gibbs did call you?

607 A. Mr. Gibbs called me.

Q. All right. And you told us now that he called you and asked you something about a gun that he lost, is that your testimony?

A. That's right. That's correct.

Q. Well, about the gun I don't know. But at that same meeting, didn't Mr. Gibbs ask you why you would not meet him?

A. He never did mention any meeting to me whatsoever.

Q. Mr. Gilbert, who did you mean when you told Mr. Campbell that you knew men in high places that could take care of Mr. Gibbs?

A. I never told Mr. Campbell no such.

Q. All right. Now, you've been on that field since '53, haven't you?

A. Sir?

Q. 53. You've been over there, haven't you? Since '53?

A. April the 28th, 1953.

Q. And you know that before the 15th and 16th of August, 1960, Mr. Gibbs was working pretty regularly, either in his own mines or hauling, was he not?

A. Yes, sir. He was.

Q. And when you left there, after the 15th and 16th of August and the cancellation of his leases, he hasn't been able to get a job since, anywhere, has he?

A. I don't know anything about what occurred to
608 Mr. Gibbs since I left there.

Q. No, I'm talking about before you left there. Now, he didn't leave there.

A. I know that Mr. Gibbs was up at Spring City doing some work. And then I know that Mr. Gibbs was in Florida with his trucks, on a road job I was told.

Q. But you ran him out of the coal field, didn't you?

A. Sir?

Q. You ran him out of the coal field?

A. I didn't run him out anywhere because I was friendly with Mr. Gibbs.

Q. And that is exactly what you told Mr. John Higgins that you were going to do?

A. I did not talk to John Higgins about Mr. Gibbs.

Q. Who is Johnny Cain?

A. John Cain is John Cain, is about the only thing——

Q. Well, tell the jury. You know who he is, Mr. Gilbert?

A. I know John Cain when I see him.

Q. Well, tell the jury who he is.

A. John Cain is John Cain, as far as I know.

Q. What does he do?

A. At one time back in '60, I think he was a representative of southern labor union. I know that he attended their labor board election, at George Ramsey's strip in August.

Q. And did you discuss anything with Mr. Cain there at that time?

609 A. I did not.

Q. You mentioned nothing at all?

A. No, sir. I talked to Mr. Wilson——

* * * * * * * *

610 Q. Now, Mr. Gilbert, at the time of the Grundy incident, August 15 and 16, 1960, there was no con-

tract at all between the United Mine Workers and the Grundy Mining Company, was there?

A. I didn't know there was such a company on that particular date.

Q. Well, now——

A. There was no contract.

Q. There was no contract, was there? Now, some of the men that wanted to go to work there that morning, that is the morning of the 16th, were members in good standing of the United Mine Workers of America, weren't they?

A. I wouldn't know about that. I don't have them records.

Q. Well, you're not saying that they were not. You just don't know, is that it?

A. I don't know.

Q. All right, sir. Now, at the time that you left that field over there, and '61 I believe is when you left, was it not? That mine still was not operating at all, was it?

A. There wasn't no such a mine.

Q. You wouldn't let it operate?

611 A. There wasn't no such a mine. Never been opened up.

Q. Never been opened up?

A. No, sir.

Q. The United Mine Workers kept it from opening up?

A. The United Mine Workers didn't keep it from opening up. The employees of the Tennessee Consolidated Coal Company kept it from opening up.

Q. Members of your union?

A. Members of my union.

Q. And you were right there on the picket line with them?

A. I never was on no pickets.

Q. Well, you went by there and knew where it was?

A. Yes. I knowed where it was.

Q. And all that time, by reason of the stand taken by the United Mine Workers in that picket line, that mine was kept closed?

A. There wasn't any mine down there.

Q. Well, let me rephrase my question. You kept them—you kept the Grundy Mining Company and Mr. Gibbs from opening a mine?

A. I didn't keep them from opening it. The employees of the Tennessee Consolidated Coal Company did.

Q. But now if the Grundy Mining Company had come along and signed this contract that you wanted on the terms that you wanted, it, then you would have let them open it?

A. Certainly so.

* * * * * * * *

612 **Redirect Examination,**

By Mr. Owens:

Q. Mr. Gilbert, do you know of any attempt of the Grundy Mining Company to open up the Gray's Creek Mine after August 16, 1960?

A. There wasn't any, to my knowledge.

Q. There wasn't anybody kept from going to work—or was there anybody kept from going to work after that period of time?

A. There was not.

* * * * * * * *

WILLIAM JENNINGS BRYAN PARMLEE,

having first been duly sworn, testifies as follows:

Direct Examination,

By Mr. Owens:

Q. Mr. Parmlee, will you state your full name please.

613 A. William Jennings Bryan Parmlee.

* * * * * * * *

Q. Where do you live?

A. Coalmont.

* * * * * * * *

Q. And what do you do?

A. I work as a finance secretary for my local union.

* * * * * * * *

Q. How old are you?

A. I'm 63 years old.

Q. Are you employed in the coal mines?

A. I previously—I worked up until '48 as a coal miner.

Q. And you haven't worked in a mine since then?

A. No, sir. I haven't.

Q. And how long have you been financial secretary?

614 A. Since 1947.

Q. Now, what local union is that? Did I ask you the number of the local union?

A. 7083.

Q. How many members does 7083 have?

A. At the present time?

Q. Well, how many did they have in 1960?

A. Well, between 5 and 6 hundred.

Q. And where did those employees work?

A. Well, there's a number of small mines in that area that's operated on the property of Tennessee Consolidated Coal Company, and there's also independent mines that's not operating on the Tennessee Coal—in other words, we call them independent mines. and there's also mines in that area that's operating on Tennessee Byproducts and Chemical Corporation, one or two mines at the present time. One, I think.

Q. Did it have any jurisdiction, your local union, over——

A. Yes.

Q. The—Did it have any jurisdiction over the Coal Valley Mine?

A. No. No.

Q. None of the employees that worked in the Coal Valley Mine were members of your local union?

A. That's right. They wasn't members. They was members of 5881 at Palmer.

615 Q. Tell me, what are the duties of financial secretary? What do you do?

A. As financial secretary? Well, I kept the record of all the members, of the dues paying members and also looked after the applications for hospital cards, benefits and pension benefits, Mine Workers' pension benefits, and also transfer cards received and transfer cards—when members transfer in or out. It's my job to enter the reports on the record; cash dues are paid to me by the companies, and there was quite a few hundred at that time operating in that area.

Q. Now you paid cash dues. What do you mean by cash dues?

A. That is, members unemployed, pension members, that pay $1.25 a month, we'll say. That was unemployed. And pension members, of course, unemployed dues were $1.25. Where they were employed, it was $4.00, of course. Sometimes they—a company would fail to cut the dues on the members and then to protect his membership, he would pay me cash dues.

Q. All right. Were you paid by the local for doing this work?

A. I'm paid by my local union.

* * * * * * * *

616 Q. Now, did you tell me you were paid a salary by the local union?

A. That's right.

Q. How did you get that office?

A. I was elected by those other men in 1947.

Q. How about the other officers? What are the other officers in your local union?

A. The other officers are elected by the majority of the men, which are members. A president, vice-president, recording secretary and a treasurer.

Q. Mr. Parmlee, did you, did you go to Middlesboro, Kentucky with George Gilbert in August of 1960?

A. Yes, I did.

Q. Tell us when you left, and what you were going up there for, and what you did, and when you returned?

A. Well, I go pretty often in order to check on
617 hospital benefits, and help correct the mistakes, if any, and Mr. Gilbert was making the trip, so I went along with him on the 14th day of August. He had business up there also, and I went along with him.

* * * * * * * *

Q. Why did you go up with Mr. Gilbert?

A. I went with Mr. Gilbert because expenses didn't cost the local union anything. Whereby if I'd have went up any other way, why it would have been an expense to the local union. And Mr. Gilbert didn't charge anything for transportation.

* * * * * * * *

Q. All right. Did you see Mr. Gilbert then Monday morning?

A. That's right.

Q. Where did you see him?

A. At the district office, Mine Workers' building.

Q. In Middlesboro?

A. In Middlesboro.

Q. And what did you do there?

618 A. Well, there was a meeting, a board meeting that day to be held by the representatives of the District 19, and, of course, I wasn't in on the meeting.

I had other work to do there, and they was in the meeting most of all that day. Or at least about all day. If I remember correctly, about all day.

Q. Well, what did you do there?

A. I was on the first floor there with the secretary, correcting, completing papers—that is, hospital papers and also checking on the various coal companies, dues reports, about all day. In fact just about all day. I worked there all day.

Q. Well, did you check your records against theirs?

A. That's right.

Q. All right. When did you return to your home?

A. Came back on Tuesday. We left on Tuesday morning. We didn't get on till it was late, and we decided to stay over, and we did stay over and we—Mr. Gilbert, it seems to me if I remember correctly, he had a little more work to do or didn't get finished up. And I think that maybe that I had some supplies to get, local union supplies to get in the office that I failed to get, so we left sometime Tuesday. Yes, Tuesday, I believe it was. That's correct.

Q. All right. What time did you get home?

A. Well, it was late when I got home because when we got back Mr. Gilbert had company and a number of calls that he had to answer, so I called my brother-
619 in-law in Coalmont, and he drove down and got me. It was late. I don't remember just what hour. It was late. I'll say it was late—7 or 8 o'clock.

Q. Well, about what time did you get to Mr. Gilbert's home?

A. As I recall, it must have been 6 o'clock. Probably later. I don't remember. But I do know we didn't leave the building until after the noon hour. I think it was after 12 o'clock before we left Middlesboro.

Q. Mr. Parmlee, do you know anything about any

picketing at the intersection of Pocket Road and the Gray's Creek Road after August 16th, 1960?

A. Well, all I know is, of course, going back and forth, I could see the men there. I, of course, heard about this from the day, but I don't recall whether I went back to work on Wednesday morning or not. I wouldn't say for sure, but I believe I did. Anyway, there was men there and a little building there, and sometimes the door would be opened. I rode with the men back and forth to work. The local union pays for my transportation. I rode back and forth with the men to work. And I'd go on down, which is about a mile, almost about a mile, from where this trouble occurred, down from the local union building. I had work to do every day and I'd—they took me on down to my work in the morning.

Q. And that would take you past this intersection?

A. Yes.

Q. Did your local union furnish any food or anything to those people that were picketing there?

620 A. Pardon?

Q. Did your local union furnish food or anything else to those people——

A. Well, no. The local union directors, some of the members, donated money to buy food, but the local union —I don't remember the local union furnishing anything, but the members did donate some money and donate food for the picket line.

Q. That's all.

Cross-Examination,

By Mr. Van Derveer:

* * * * * * *

622 Q. Mr. Parmlee, where were you on the 17th of August, 1960?

A. I don't remember whether I went to work or not. I'm not sure about that. I won't say. I'm not sure whether I went to work or not. That was a—sometimes I would be off from my job and I don't know whether I went to work on the 17th or not.

623 Were you in this group there at Palmer that day?

A. No, sir.

Q. You know nothing about that?

A. No, sir.

Q. And, of course, you know nothing about what happened there on the 15th and 16th of August, 1960, do you?

A. I sure don't.

Q. But you do know that the United Mine Workers did not have any sort of a contract with the Grundy Mining Company on the 15th or 16th of August?

A. Not as I know anything about, they didn't?

Q. And they don't now, do they?

A. Not as I know of. I don't know.

Q. But that mine was kept closed or the mine workers kept it from being opened—let's put it that way—from August until it was opened here last year?

A. Well, you have reference to the Gray's Creek Mine?

Q. Yes, sir.

A. Well, I wouldn't know what the exact date that they begin the operation there——

Q. Well——

A. You see, the only thing that I could say was that the mine broke down in a pocket area on March——

Q. Well, let me rephrase it this way, then. How long did you all keep that Gray's Creek Mine from opening?

624 A. I don't know anything about keeping—not keeping——

Q. Well, how many months was it?

A. I wouldn't know. I wasn't—I wasn't out there.

Q. Well, certainly you saw the picket line there if anything?

A. Well, I saw the men going back—as I was going by—I saw the men there—in that building—passing back and forth on my way to my work——

Q. Well, how long did the picket line stay there then?

A. Quite some time. I don't remember. Must have been there—it must have been 8 or 9 months they were there.

Q. Then the mine workers kept that mine from opening for 8 or 9 months?

A. I—well, I don't know whether they did or didn't——

Q. We have nothing further.

Redirect Examination,

By Mr. Owens:

Q. What is your territorial jurisdiction of 7083?

A. That's in the pocket area—pocket area.

Q. How about 5881?

A. 5881—that's Palmer.

Q. This, this Gray's Creek Mine then was within the jurisdiction of your local?

A. About the Gray's Creek area—I suppose is in the jurisdiction of 5881.

* * * * * * *

626 **HOWARD C. HUMAN,**

having first been duly sworn, testified as follows:

Direct Examination,

By Mr. Owens:

Q. What is your name?

A. Howard Cecil Human.

* * * * * * *

Testimony of Howard C. Human

Q. What is your occupation?

A. General superintendent for Tennessee Products and Chemical Corporation.

Q. How long have you held that position?

A. Since January of '61. January 30th.

Q. What did you do prior to that time?

A. With Goodman Manufacturing Company.

* * * * * * *

Q. Mr. Human, do you know Mr. Paul Gibbs?

A. Yes.

Q. When did you meet Mr. Gibbs?

A. Shortly after my arrival on this job.

627 Q. Did he have a mine leased or under contract with your company?

A. Yes.

Q. There's being handed to you a document. Will you tell us what that is?

A. That is a lease with our company—a lease or sub-contract with our company—for the operation of four mines on our property, 41, 57, 74 and 75.

Q. And who is the lease with?

A. Tennessee Products and Chemical Corporation and Paul Gibbs.

Q. Now, is that a lease of the coal land or is that just an agreement where Mr. Gibbs is to produce coal from your lands?

A. This is an agreement or sub-contract for the mining of coal on our property.

Q. All right. now. Lists how many mines?

A. Four.

Q. Four? Will you describe how those mines are designated—what's meant by those numbers—74 and 75?

A. That is the designation that is given a certain area on our maps, and the mine that goes into that particular

area will have that number. There will also be a number in front of that—a 1, 2 or 3 to designate what particular area of the property that the mine is on.

Q. How many mines of this type did you—did Ten-
628 nessee Products have in 1960, approximately?

A. That was before I came to the company. I would guess in excess of 50.

Q. How many did they have in 1961?

A. Probably about 40 or 50 at that time.

Q. Now, calling your attention to this agreement, what price was Tennessee Products to pay for the coal that was mined by Paul Gibbs?

A. Are you referring to the price in the lease?

Q. Yes.

A. 3.45.

Q. I notice that there in pencil two other figures after that price of $3.45—7 cents and I believe the other is 60 cents. Will you explain what that is?

A. The 7 cents was a raise that was given—I think prior to my coming with the company—is the increased price—7 cents. The 60 cents is actually the addition to that price by my company, it's a bookkeeping addition of a royalty sum and then they deduct the royalty.

Q. Then what was the amount of money that Mr. Gibbs received from the sale of that coal produced in his mines from your property.

A. Prior to the 7 cent increase, it would have been $4.05. After that time, it would have been $4.14.

Q. And from that was deducted 60 cents, which was
629 the royalty due?

A. Yes.

Q. So that he would actually receive then $3.45, or when the 7 cents went on then would be $3.52 a ton?

A. Yes.

Q. Does that lease carry an expiration date?

A. It does not.

Q. What are the terms? Would you read the clause that has to do with cancellation of the lease?

A. "Unless cancelled or terminated as herein provided, the duration of this contract shall be for one year following the date of execution hereof, and from year to year thereafter. Either party shall have the right to cancel this contract at any time upon serving 30 days written notice on the other party, specifying the date of cancellation and termination and upon the expiration of said period of time said contract shall stand fully cancelled, terminated and thereafter of no further force and effect."

Q. I ask that that be marked as next defendant's exhibit —what is it 37? And that it be submitted into evidence. All right. Now, Mr. Human, did Tennessee Products cancel the leases on these mines in 1961?

A. Yes.

Q. Can you tell me when the first cancellation occurred?

A. In so far as I know, it was in January of 1961 630 on the 74 mine.

Q. All right. Who had your position prior to your coming there?

A. Mr. Travis had that position as late as October of '60, and during the interim when Mr. Travis left, a Mr. Merriman in Nashville assumed control of the property and a Mr. Daffern in the Whitwell area was in control of the property.

Q. Do you have a man the name of Coffelt, or something like that?

A. Billy Coffelt.

Q. What job did he have?

A. He was an—worked in the office at the Whitwell operation.

Q. I hand you a letter and ask you—a copy of a letter—and ask you if you can identify that?

A. Yes, sir. That's a letter that I wrote.

Q. Who did you write the letter to?

A. Mr. Gibbs.

Q. What's the date?

A. September 7th, 1961.

Q. I ask that that be marked the defendant's next exhibit and admitted into evidence.

Reporter: 38.

* * * * * * *

631 Q. Well, would you read that letter, Mr. Human?

A. "Whitwell, Tennessee. September 7, 1961. Mr. Paul Gibbs. Tracy City, Tennessee. Dear Mr. Gibbs: It has just come to my attention that mine 2-074, that was formerly leased by you is presently being worked in your name. In checking through our files, I note that a lease cancellation letter for this mine was sent to you on January 5th of this year. This is to advise you that since no lease is in existence covering this mine, all work in and around 2-074 should be stopped immediately. Please contact me at our Reals Coal office if there are any questions concerning this matter. Yours truly, Tennessee Products and Chemical Corporation, Howard C. Human, Assistant Vice President, Mining."

Q. In addition to this agreement that you had to produce coal from your mines, did you have another agree-

632 ment to purchase coal from Mr. Gibbs?

A. There was an agreement between Mr. Gibbs and our company for the purchase of coal from other sources to fill a contract that he was putting in—one of our contracts.

Q. There is being handed to you a copy of another letter. Will you identify that letter and tell us what it is?

A. That's a letter written by me, another letter on September 7, to Mr. Gibbs, relative to the quality of coal that was going in on one of our contracts.

Q. All right. Will you read that letter?

A. "Whitwell, Tennessee. September 7th, 1961. Mr. Paul Gibbs, Tracy City, Tennessee. Dear Mr. Gibbs: As you know we have been having considerable problems with the quality of our outside coal that is being put in on the Markette Cement Plant contract. After going over our latest analysis covering this coal, it appears that the hoped for improvements have not been forthcoming, and that quality problems will continue to be a problem with this coal. In order to try to improve this situation, we are going to eliminate the delivery of purchased coal from mines or companies that are operating outside of the Tepco lease holds. Effective Monday, September 18th, all coal deliveries on the Markette contracts must come from mines that are operating on Tepco lease holds. This should give you ample time to make the necessary arrangements to purchase coal from the small mines on our property in an amount equal to that which you are presently
633 purchasing from outside sources. Please contact me at our Reals Coal office if you have any questions on this matter. Yours truly, Howard C. Human."

Q. I ask that that be admitted in evidence as exhibit—is it 39?

Mr. Reporter: 39.

Q. I notice that this letter says Tepco lease. What's meant by Tepco?

A. That's Tennessee Products and Chemical Corporation.

Q. And that's your company?

A. Yes, sir.

Q. Had you had any complaints about the coal that had been delivered, had been purchased by Mr. Gibbs, and delivered to this—the purchaser—in regard to the quality of this coal?

A. I had had complaints through our sales department

as to the quality of the coal that was being put in at Markette.

Q. What did they say was wrong with it?

A. High ash.

Q. What was the first date that you learned that they had this complaint?

A. In May, I believe, was the first time that I ran into the problem.

Q. What year?

A. 1961.

Q. Now, will you tell us what you mean by the ash
634 content, and how that is measured, and how you test it, and what is an acceptable amount of ash content and what was unacceptable?

A. On this particular contract, the Markette people, our contract specified 12% ash. In verbal discussions with our people, they were pushing for 10%. In other words, they wanted to—wanted us to give them a better quality coal than the contract actually called for.

Q. And what kind—what was the ash content of coal delivered by Mr. Gibbs?

A. The outside coal that was purchased, both from Mr. Gibbs and other operations that bought some outside coal, ran anywhere from 13 to 16%. I think we have one instance that it went around 29%.

Q. Did you tell Mr. Gibbs about this—complaints they'd had?

A. Yes. We discussed it. I discussed it with both he and the other individuals that were putting in on this contract.

Q. Did you have another operator that was doing the same thing and you also cancelled his contract because of this?

A. We had another operator, Jim Campbell, who was purchasing outside coal, and we also stopped the purchase of outside coal from Mr. Campbell.

Q. It's been handed to you another letter—a copy of another letter. Can you identify that letter?

A. That's another letter from me to Mr. Gibbs.

635 September 26, 1961.

Q. All right. Will you read that?

A. "Whitwell, Tennessee. September 26, 1961. Mr. Paul Gibbs, Tracy City, Tennessee. Dear Mr. Gibbs: During the past several weeks, there has been a considerable discussion concerning the ash analysis on the outside coal being delivered on the Tepco coal contract at the Callim Cement Company. On September 7, 1961, you were notified verbally and by letter from this office that effective September 18, all deliveries made on this contract must be of coal mined from the Tepco lease holds. According to our recorded scale weight tickets, this was not carried out during the week ending September 22, 1961. As a result this is official notification that no further deliveries of coal from any source will be accepted on the Callim Cement contract. This will confirm our phone conversation of last evening. Should you have any further questions on this matter, please contract me at the Whitwell office. Yours very truly, Howard C. Human."

Q. I ask that that be admitted into evidence.

Mr. Reporter: 40.

Q. Now, there's one other mine that's listed there—by the way, what were the two mines—or what mines was Mr. Gibbs operating in 1961?

A. I think there was some coal from the 59 mine, the 75 mine, and also some coal was produced in the 74.

636 Q. All right. Now when was the—or was the lease or the agreement cancelled as to the number 75 mine?

A. The lease on 75 was cancelled in March of 1962.

Q. All right. Do you have a copy of that letter?

A. I do not have one with me.

Q. When was the last time you saw it?

A. The day that I was reported for the deposition to be taken in Mr. Van Derveer's office and I either left the letter in the office at that time or lost it, returning back to Whitwell.

Q. Was that letter read into evidence at that time?

A. Yes, it was.

Q. Your Honor, I ask permission since the letter has gotten lost, to read that letter——

Mr. Van Derveer: To which we have no objection to.

The Court: All right.

Q. I'm reading from your deposition, and I want you to listen carefully and see if this is the letter that you wrote to Mr. Gibbs. "March 8, 1962. Mr. Paul Gibbs, Tracy City, Tennessee. Dear Mr. Gibbs: In view of the fact that mine 2-075 has been idle in excess of 30 days, this letter is to inform you that the coal contract of October, 1, 1959, pertaining to said mine is to be considered cancelled and void, 30 days from the above date. We understand that you have some of your equipment in the mine and expect you will have it removed in the
637 aforementioned period. If you have any questions concerning this matter, please contract me at the Reals Coal office. Very truly yours, Tennessee Products and Chemical Corporation, H. C. Human, General Superintendent." Is that the letter? I note that the letter said that the mine had not operated—or been idle in excess of 30 days. Do you know the last day or the last month that Mr. Gibbs produced coal from that mine?

A. I believe it was in December of '61.

* * * * * * *

641 Q. Now, did you have any discussions with Mr. Gibbs about leasing any more property in—from your company?

A. At the time we were discussing the purchase of all the coal or the sending of all the coal to the cement company from our property rather than purchasing outside coal, we discussed it and Mr. Gibbs was interested in obtaining another lease. However, I didn't have any-
642 thing in the Whitwell area. The only thing that we had was in the Daws area, which the coal seam is more unever, the risk is a little greater, and—in that area— and he wasn't too interested in taking a mine up there in that particular area. I had nothing to offer him in Whitwell.

Q. Did you offer him a mine in the Daws area?

A. As I recall, I told him to look the area over and to see if there was anything in the area that he would like, and then we would discuss it, the situation.

Q. When was the last conversation that you had with him in this regard?

A. I would say in September of 1961, probably.

Q. Did he ever, subsequent to that time, ask you to lease him any property or let him operate any mine on the Tennessee Products property?

A. I don't recall that he did.

Q. Now, who had the—are you the man that made the decision to cancel these leases and to cancel these contracts——

A. Yes.

Q. ——with Mr. Gibbs?

A. Yes.

Q. You had that authority?

A. Yes.

Q. Did any representative of the United Mine Workers of America, either District 19 or the international union or any officer ask you to cancel those leases or
643 intimate to you in any manner that you should cancel them?

A. No, sir.

Q. Do you make this decision entirely on your own?

A. Yes, sir. I discussed it with my superiors. However, I made the decisions.

Q. All right. Do you know Howard Madewell?

A. Yes, sir.

Q. Who is Howard Madewell?

A. He is the local representative of District 19, UMW of A.

Q. Did you have any discussions with Mr. Gibbs—er—a—with Mr. Madewell about cancelling these contracts—or, well let me rephrase that. Did you have any discussions with Mr. Madewell in the spring of 1961 about Mr. Gibbs?

A. I don't recall that we had any specific discussion relative to Mr. Gibbs as such. We may have discussed him in general with a lot of other operators. I do not recall that there was ever a specific meeting on that as such. No.

Q. Well, when did this discussion or discussions take place?

A. I would say in early—or about the middle—just before June, probably, of 1961— April, May, June, along in that area.

Q. Did you know the operators in that area very well?

A. No. Actually I was getting acquainted with most of the operators and a lot of the people in the area at that time.

Q. How did you discover that Mr. Gibbs' lease had been cancelled back in January?

644 A. By going through the files. Periodically I would go through the files to familiarize myself some of the previous goings on in that area, and just by accident I ran across the letters relating to the cancellation.

Q. So that actually the mine 74 was cancelled prior your coming to—with Tennessee Products?

A. According to the information in the files, yes.

Q. Did you ever have any discussion with any other representative or officer of the United Mine Workers America regarding Mr. Gibbs?

A. No, sir.

Q. Is the Tennessee Consolidated Coal Company a competitor of yours?

A. Yes, they are.

Cross-Examination,

By Mr. Van Derveer:

* * * * * * * *

645 Q. Now at all times involved here, did the Tennessee Products and Chemical Company have a contract, a collective bargaining agreement with the United Mine Workers of America?

A. Yes, they did.

Q. That is, while Mr. Travis was there, and while you were there, and you do today?

A. Yes, sir. That's true.

Q. Now, what is the protective wage clause in the contract?

A. I'm not sure that I can quote.

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647 Mr. Kramer: Then let the Court read it.

Mr. Van Derveer: The only thing is—let's see almost two full pages, to say the least.

Mr. Kramer: I suggest that the jury be excused for moment and let your Honor take a look at it——

The Court: All right.

Jury excused.

In the absence of the jury:

The Court: All right.

Mr. Van Derveer: Now, here is the gist of this without reading the whole thing: The protective wage clause or agreement is an agreement by and between the United Mine Workers and signatory, in this case, Tennessee Products, that upon all lands that the Tennessee Products Company has or owns, that they, The Tennessee Products, will see that if there are any leases or subleases or sub-arrangements, or whatnot, that the sub-leasee, or the people on down the line will comply with the terms of this agreement also, as to wages, hours, or what not. Now let me read that provision. "It is recognized that when signatory operators mine, prepare, procure or acquire under sub-contract, agreements Bituminous coal miner, the terms and commissions less favorable than those provided upon this contract, they deprive employees of employment opportunities, employment conditions, accordingly. The operators agree that all bituminous coal mined, pro-
648 duced or prepared by them, or any of them, or procured or acquired by them, or any of them, under a sub-contract arrangement, shall be, or shall have been mined or produced under the terms of today which are favorable to the employees of this contract." What it is, is that it just breaks it on down, that way. Now, our position on that, and I'll show this to the Court, is simply that these people here are signatory to that contract. The union, then, regardless as to the arrangement that existed between Tennessee Products and the other people have got to put enough pressure or cancel, or do something so as to make them live up to that part of this particular contract.

Mr. Rayson: Your Honor. As to the Protective Wage

Laws, I'm of the opinion it is immaterial to the issue in this case. It has nothing to do with the cancellation of the leases, it wasn't plead as a violation of the law in anyway, whether the legality of that clause has been knocked on and questioned up to this time. It's a very complicated procedure; it merely says that an operator will not purchase—let me read it to you. "It is recognized that when signatory operators mine, prepare, or procure, acquire, under any sub-contract arrangement, bituminous coal mine, under terms and conditions less favorable than those provided for in the contract, they deprive employees of employment opportunities, etc. Accordingly, the operators agree that all coal mined, produced, or prepared by them,
or any of them, or prepared, or procured, or ac-
649 quired by them, or any of them, under a sub-contract arrangement, shall be or shall have been mined or produced under terms and conditions which are favorable to the employee, of those provided for in this contract." It doesn't provide for the cancellation, or the causing of the Products Coal, Tennessee Products, or any operator, to cease doing business or to cancel any contract they may have had with Mr. Gibbs.

Mr. Van Derveer: Now, may it please the Court, I'd like to supplement what Mr. Owens has said, and I don't mean to be interrupting; subsequent proof here, will show that a union representative went to Mr. Human and demanded that these contracts be cancelled, and that is one of the reasons that was given for the cancellation. Now, there again, we think that is relevant on the issue there of the secondary boycott. The individual union man that is involved in this, is Mr. Howard Madewell. Now, I say that is not in evidence yet, but will come in to evidence, but I say that to try to show the continuity of the evidence.

Mr. Owens: Well, there isn't any such evidence in the

records of Mr. Madewell asking to cancel that contract at all, and if he had any evidence like that, he should have put it in evidence in his own case. How he's going to produce that now, I don't know, but this part had nothing to do with it. The testimony of Mr. Human was that Mr. Madewell had no influence, whatsoever upon cancelling this contract, didn't attempt to in any way.

Mr. Van Derveer: I haven't finished the cross-
650 examination of Mr. Human, may it please the Court.

The Court: Gentlemen, I'm not sure that I understand just where we stand. This contract is in evidence already, and this provision, I assume, is in evidence, along with all the rest of the contracts.

Mr. Van Derveer: I think that is correct, and the only thing I sought to do by this evidence, to which they object, and really I don't see the basis for the objection, inasmuch as it is in evidence, is to tie in the piece, or that part of the contract to what actually happened.

Mr. Rayson: May I say this, your Honor, as far as I'm concerned, I think this is my basis for objection, and that is this: it seems to me it would be an opportunity to change courses in the middle of the stream. Mr. Van Derveer said that the union went to Mr. Humans, and told Mr. Humans to get rid of Gibbs because of this incident at Gray's Creek, where the proof is positive against such, and now Mr. Van Derveer is saying that the Union did this some way under this protective wage clause. It seems to me to be an entire change of theory, which can only result in confusing the matter. I don't understand the purpose of it; I don't understand the materiality of the Protective Wage clause. Does it matter about the testimony of anyone to discuss the protective wage clause in connection with this matter? Mr. Gibbs didn't say that they had, the letters don't say that they had and Mr.

Human certainly doesn't say that they have, so I
651 don't see the materiality of the protective wage clause in this case.

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652 Q. Mr. Human, you have told us that at all times involved here, your company did have a collective bargaining agreement with the United Mine Workers of America?

A. That's true.

Q. Your big mine, in that particular area, was known as the Reel's Coal Mine, was it not?

A. Yes, sir.

653 Q. How far is your Reel's Coal Mine from the Gray's Creek Mine?

A. Probably, and this is just a guess, by road, it's probably six or eight miles.

Q. Six or eight miles. It's just off Highway 108, I believe, isn't it?

A. That's rig . Ours is.

Q. Yours is, that's right, Reel's Coal Mine. Now, if it's eight miles from the Gray's Creek Mine, how far is your Reel's Coal Mine from the Coal Valley Mine?

A. I would say it would be further than that; probably ten or twelve miles.

Q. At any rate, the group, or mob, that was there on the 15th and 16th passed right by your mine?

A. I wasn't there at the time. I can't answer that, sir.

Q. To say the least, the officials of your company were aware of their presence, weren't they?

A. They probably were, yes.

* * * * * * *

Q. You've told this Court and jury that the first proof, or evidence at all, of any ash content in Mr. Gibbs' coal,

or the coal that Mr. Gibbs was delivering to you, came to your attention in May of 1961?

654 A. As far as I recall, that's right.

Q. But, now, I want you to take these letters, your exhibits Number 38, 39 and 40, and ask you if your company didn't cancel his lease in January of '61?

A. On the 74 mine, yes.

Q. The point about this is simply this: the cancellation your company, TEPCO, cancelled that lease before there was one single, solitary word ever said about ash content, back in January of 1961, isn't it?

A. In so far as I know, they cancelled them before I came.

Q. All right. Your records don't show anything else, do they?

A. No, sir. Not to my knowledge.

Q. What your company did then, your company, as you told us, knowing about the events of the 15th and 16th, cancelled Mr. Gibbs' lease before there was one single, solitary word ever said about any trouble with the ash, which is true? That's right.

A. They was cancelled prior to my coming there, so I——

Q. That's right, but still, at the same time that——

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655 Q. Mr. Human, did you not testify on direct examination that when you arrived and took over your present job at Tennessee Products, that you checked the records of the company and found there that a cancellation notice had gone out to Mr. Gibbs in January of 1961?

A. Yes. That was several months after I arrived.

Q. That's right. But, is that the first notice and the

only notice in the records of your company, there, which shows when your company first cancelled Mr. Gibbs' lease?

A. Insofar as I know, it is.

Q. Correct, sir. Still, by your same testimony, and the records that you hold before you, there was no difficulty with any ash content until May of 1961. Is that correct?

A. To my knowledge, that is correct.

Q. Now, certainly——

A. I speak only back to January.

Q. When you say "to your knowledge", you searched the records in this case, have you not?

656 A. Yes, sir.

Q. And you've found nothing to the contrary, have you?

A. No, sir.

Q. All right. Now, let's follow through with the cancellation notice going out before anything about any ash content, is it not true that in 1961, Mr. Howard Madewell discussed Mr. Paul Gibbs with you?

A. I don't recall. Mr. Gibbs' name came up in discussions with him, but I do not recall that we ever had a specific discussion or a meeting, as such, just to discuss Mr. Gibbs.

Q. But among the other discussions, and I read to you, sir, your answer, taken from the deposition, which was taken in my office. I quote from page 157 if you want to follow me: I asked you—"What was the gist of this conversation you had with Howard Madewell in 1961?—and you replied, "Our only, our conversation in general, were on such general problems of the area. He was new in the area and I was new in the area, and periodically we would meet. There might be some specific problem at an individual mine, that we would talk about, but it was general conversation mostly, and at the time, or from our conversations I was aware that the organization wasn't

too fond of Mr. Gibbs in many respects." Was that your testimony?

A. Yes, it was.

Mr. Kramer: Your Honor, let me——

Q. "However, Mr. Madewell, at no time, asked me
657 to do anything about Mr. Gibbs."

A. That's correct.

Q. But you did, Mr. Madewell did then convey to you the United Mine Workers displeasure with Mr. Gibbs?

A. I was aware of it. I can't specifically say how I became aware of it, or make any specific remark at this time, because I can't recall a specific remark that was made to it, but I was aware of it.

Q. All right. Now, following that, or let's go back before that, is it not true, and I want you to think before you answer me here, sir, that Mr. Jim Campbell and Mr. George Gilbert came to you and asked you to cancel the lease of Mr. Paul Gibbs?

A. No, sir.

Q. Do you deny that took place?

A. Yes.

Q. All right. But, you are certain that you did discuss Mr. Gibbs with Mr. Madewell?

A. Yes, sir.

Q. Now, for what reason, sir, would you have to discuss Mr. Gibbs with the union organizer, if it were not in relation to what would happen to your contract if you continued doing business with Mr. Gibbs?

A. I discussed a number of the operators at various times with Mr. Madewell. During '61, for one thing, we had a series of strikes that we would discuss, and
658 generally it would be one mine that would cause such problems. In other discussions I knew very little about the operator; I would ask questions of all

sides, in order to try and form an opinion as to what type of operators we had.

Q. At any rate, you didn't want trouble with the union, did you?

A. Well, no. You don't go out and ask for it.

Q. That's right. When a union organizer tells you he's not very fond of this fellow, you try to comply with his wishes, don't you?

A. I don't believe Mr. Madewell ever specifically asked me to do anything with Mr. Gibbs.

Q. But he did express to you his displeasure?

A. I had gathered that in our conversations.

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660 Q. All right. You've told this Court and jury that you cancelled certain leases of Mr. Gibbs, did you not?

A. Yes, sir.

Q. At the same time, and by your—don't look at the people, just look at me—by your own statement you needed coal to fill those contracts, did you not?

A. Right.

Q. By your same statement, your own statement, you had available lands with coal located thereon, and you were looking for competent people to lease those lands to, weren't you?

A. Yes, sir.

Q. And for eight or nine, uninterrupted years, Tennessee Products had been doing business with you, and satisfactorily mining your coal?

A. I can only speak back to January. Prior to that, I have no knowledge of any problem.

Q. Well now, sir, did the records of your company reveal any difficulty, shape, form or fashion with Mr. Paul Gibbs——

A. Not that I know of.

Q. Before this?

A. Not that I have any knowledge of.

Q. All right. With a happy relationship existing between your company and Mr. Gibbs, with you needing coal, and your knowledge that he was competent to
661 mine that coal, he came to you and asked you, a number of times, for a lease, did he not?

A. That is right. Prior to September or October of——

Q. And you refused to give him a lease?

A. I suggested that he go to our Dawes area, and see if he could find anything that he would be interested in.

Q. That's right. But you have other lands than the Dawes area?

A. Not in the Whitewell area.

Q. In the Pocket?

A. No, sir.

Q. Well, you had better lands than the Dawes area, then?

A. I don't think we leased any mines in Pocket area or Whitewell area since that time.

Q. All right. Let's take your own lands in the Dawes area, then. You needed coal at that time to fill contracts that you had, did you not?

A. Yes, sir.

Q. But you wouldn't execute this man a lease, would you?

A. Mr. Gibbs wasn't too interested in the Dawes area due to the conditions there.

Q. O course, the union didn't have anything to do with him not getting that, did it Mr. Humans?

A. Not as far as——

Q. Well, let's put it this way, and this is the last ques-

tion that I'll ask you. You did not lease Mr. Gibbs
662 the land and you have not had trouble with the union, have you? That's right.

* * * * * * *

A. We've had a number of strikes since that time——

Q. But you are in production now?

A. Yes, sir.

Q. And have been, on a pretty steady basis?

A. I think this year we lost about 50 days on strike so far.

Q. That's all. A total of 50?

A. That's working days, yes, sir.

Q. But you still refuse to execute a lease for this man here, don't you?

A. I haven't been asked since September or October of '61.

Mr. Van Derveer: I believe that's all.

Redirect Examination,

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663 Questions by Mr. Van Derveer:

Q. Do you know, of your own knowledge, where the samples came from upon which the tests for ash were made? Now, I'll rephrase it. Do you know, from your own knowledge, not what someone told you, where the samples came from, from which the ash tests were made?

A. We started, just before mid-year of '61, we started sending our own lab man——

Q. Just one minute. I'm asking you, sir, or your own knowledge, now——

664 Mr. Owens: Objection. Let the witness answer.

A. Well, I was not present when the samples were taken.

* * * * * * *

Q. Did the complaints about the ash content of the coal come on coal purchased outside of the property of the Tennessee Products?

A. I don't believe the customers specified where the coal was coming from. The thing he complained about was just high ash in general.

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665 Q. Did you later determine or find out where this coal came from?

A. Yes.

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Q. Do you know?

A. Do I know where the high ash coal came from?

Q. Yes.

A. Yes.

Q. Where did it come from?

A. According to our own analysis, it came from coal that was being purchased off of the property.

Q. Does Tennessee Products maintain a laboratory to test this coal?

A. Yes, sir.

Q. Is that under your supervision, that laboratory?

666 A. Yes, sir.

Q. And from the reports of that laboratory, it showed that the ash content of the coal, purchased from outside sources, was above the standards that the purchaser required?

A. Yes, sir.

Q. Mr. Humans, Mr. Van Derveer said that you had had happy relationships with Mr. Gibbs in 1961. Was the relationship between the Tennessee Products and Mr. Gibbs a happy one in 1961?

A. We had some problems, relative to our ash. I don't recall any particular ones early that year that I had had with Mr. Gibbs.

Q. Do you know who is Mr. W. A. Moody?

A. He is the secretary, or was the secretary and legal counsel in our Nashville office.

Q. Do you make reports to Mr. Moody?

A. Yes, sir.

Q. Did you report any difficulty to Mr. Moody, other than the ash content; any difficulty you may have had with Mr. Gibbs?

A. The primary thing that I discussed with him, as I recall, was the ash trouble and the problems that we were having trying to hold the contract.

Q. I'll hand you a letter, and ask if you can identify that letter, Mr. Human?

A. Yes. That is a letter from me to Mr. Moody, on September 26, 1961.

Q. Would you read that letter?

667 A. To: Mr. W. A. Moody. From: H. C. Humans. Subject: Paul Gibbs and Marquette Cement and Manufacturing Company. "This will confirm our phone conversation as to the cancelling of Paul Gibbs Cowan Coal contract, effective today, September 26, 1961. I have also shut down the 2074 Mine, operated by Gibbs without a lease on this property. Mr. Earl Nunnally, who operated the 2074 for Paul, was in today to discuss the matter of this mine. Last week, he mined 104 to 106 tons of coal, and Paul turned in 209.45 tons, delivered and ..... The difference was Tracy City strip coal, of poor ash quality as I told you. Mr. Nunnally also stated that Paul had tried to get him to go over to the picket to Jim Campbell to prevent him from putting coal into ....., but he said he refused. He is mad at Paul for getting him to go into 2074 without a lease. He has information as to what he mines, and says we can have it if we want it. 2075 was reported to have mined 210.9 tons per haul, but Nunnally

says this is not true. It looks like Paul screws everything and everybody he comes in contact with." H. C. Humans.

Q. Did you have any difficulty——

Mr. Owens: Your Honor, I ask that that be admitted into evidence.

(Defendants exhibit No. 42 tendered and received in evidence.)

Q. Did you have any difficulty in determining how much coal Mr. Gibbs was producing?

668 A. From his mine?

Q. Yes, sir.

A. Actually, I didn't have any problem on that. I know of nothing to show or state that Paul did anything other than what our records show.

Q. This was the subject of this letter, wasn't it, that it was reported to you?

A. Yes, sir.

Q. After reading that letter, would you say—the last line—"It looks like Paul screws everything and everybody he comes into contact with." Would you describe that as a happy relationship?

A. I think that's personal; the privilege of personal discussion between myself and my company.

Q. Were there any other mines cancelled in January, or any other contracts which you had with other operators, cancelled in January?

A. There were a number of contract cancellations in January.

* * * * * * *

669 **Recross-Examination,**

By Mr. Van Derveer:

670 Q. Now, Mr. Humans, I want to close by asking you about three subjects, right briefly; one—where

the samples came from for the ash, you do not know, of your own personal knowledge where the samples came from?

A. I was——

Q. That's correct.

A. I was not present when they were taken——

* * * * * * *

A. A representative of my company, generally would be present.

Q. But you were not?

A. I was not.

Q. Whether the samples that the ash content, that you say was taken, was supplied by Mr. Gibbs or somebody else, or the United Mine Workers of America, you don't know?

A. I did not personally see the samples taken. No, sir.

Q. All right. Now, the second subject; and even with the ash content, as you say there was, the ash content did not come into play until after you had first cancelled Mr. Gibbs' lease. Is that correct? The records show they were cancelled?

A. As I recall, the ash problem came up in May.

671 Q. And the lease cancellation took place in January?

A. Yes. That was what it was when I came there, according to the records.

Q. All right, now, the third thing; when you cancelled Mr. Gibbs out, you, at that time, needed coal mined to fill contracts that you had, did you not?

A. Yes, we needed the coal.

Q. All right. The fourth and remaining one, now; in regard to the relationship of Mr. Paul Gibbs and Tennessee Products, prior to August 15th, 16th, or 17th, 1960, do the records show anything, whatsoever, but a happy, suc-

cessful relationship with Mr. Paul Gibbs and your company?

A. I can't testify personally, but insofar as our records are concerned, I've never found anything in them. No.

Mr. Van Derveer: That's all.

* * * * * * * *

672 **H. D. ROSS**

(after being duly sworn, the witness testified as follows.)

Direct Examination,

By Mr. Rayson:

Q. Would you state your name, please?

A. Homen Douglass Ross.

* * * * * * * *

673 Q. All right, sir. Mr. Ross, where do you live?

A. I live at Palmer.

Q. What do you do, sir?

A. I'm a coal miner.

Q. By whom are you employed?

A. Well, it's been Tennessee Consolidated Coal Company, and now they claim it's Grundy Mining Company.

Q. All right, sir. When did you go to work for Tennessee Consolidated Coal Company?

A. Well, I worked some in '26, and then was off some, and it's been continued employment since 1930.

Q. What work do you do?

A. I'm what you call a timber-man now.

Q. You place the timbers in the mine that holds the roof up?

A. Yes, sir. I put the timbers in place.

Q. Are you a member of the United Mine Workers?

A. I am. Yes, sir.

674 Q. Been a member of that organization for some time?

A. Since '33.

Q. What local union do you belong to?

A. 5881.

Q. Mr. Ross, were you at the Gray's Creek Mine on August 15th and 16th in 1961, when Mr. Gibbs and some other men evidently came there to go to work?

A. No, sir. I was not.

Q. Had you, prior to that time, heard that anyone was going to go there to go to work?

A. Yes, sir.

Q. Would you tell the Court and jury when you first heard that, and under what circumstances?

A. Well, I guess it was sometime in the neighborhood of a year before this. In a meeting some of the men said that Stanley Meeks was going to take some men in there.

Q. Now, I'm talking about 1960. In August of 1960, when Mr. Gibbs went there, when did you first hear that Mr. Gibbs and some other men were going to work there?

A. I come in Tuesday evening, late Tuesday evening, and I'd been down on the river, and I heard it, that they was trying to get on some work, over there.

Q. This was after the 16th, then, is that right?

A. Tuesday, the 16th.

Q. Is that the first you had heard of it?

675 A. Yes, sir. I was down on the river.

Q. Had you heard prior to August the 15th, that anybody was going to go in there on the 15th?

A. No, sir. Not Gibbs, no, sir.

Q. Had you heard that anybody was going to go in there?

A. Well, sometime back, maybe a year before that, I'd heard that Stanley Meeks was going in there.

Q. I see. All right, now then, after you came back from your trip and heard that Mr. Gibbs and some other

men had been in there on the 15th and 16th, did you ever go out and serve on a picket line, there at Gray's Creek?

A. Yes, sir. I did.

Q. Did you do that few or many times?

A. Sir?

Q. Did you do that on more than one occasion?

A. Yes, sir.

Q. How often would you go there?

A. Well, I took my time, or went, or however you want to call it, on Sunday.

Q. Who arranged—who made those arrangements?

A. Well, I made it, I guess, as much as anybody. We just talked among ourselves, and I took Sunday and picked up two more men in my pick-up truck. That was my day for a pretty good while, and then I changed to Wednesday.

Q. How long did that picket line stay there, if you remember?

676 A. Sometime after August 15——

Q. How long did it stay there, after you first saw it there, when you got back from your trip? Did it stay there for more than a month, or——

A. Yes, sir.

Q. How long do you think it stayed there?

A. Sometime—well, I don't whether—I suppose it was there the 15th and 16th, but there from the 17th, I know it was sometime in the following May.

Q. All right. While you were serving as a picket there, from time to time, did anyone go to work in the Gray's Creek Mine?—while you were serving as a picket there.

A. I didn't get the question.

Q. While you were serving as a picket, Mr. Ross, did anyone go in to the Gray's Creek Mine to go to work?

A. Well, there was what they call a "stripping outfit", and they had auger down there, and them men worked on.

Q. Did they work all the time?

A. Yes, sir.

Q. Was there ever any difficulty, were there ever any blows, or arguments, or violence of any kind on this picket line on the days that you served?

A. No, sir. I never did see none.

Q. How many of you would serve there as pickets?

A. Well, I only took two with me; I had a pick-up
677 truck and I picked up two, and there was three or four, maybe about five that sometimes one of them wouldn't be able to go, and I'd go get the other one, and so I only took two, besides myself, on the days I was on, in the pick-up truck.

Q. All right, sir.

A. That's the reason. It had been promised to us Coal Valley men, and you could very well tell being in there, that the mine wasn't going to last too long; on the left side it cut in to the old works, and the right side was in awful bad condition, so the men working in there could very well tell——

Q. At any time did——

A. You know, we thought it would.

Q. Yes, sir. At any time, did George Gilbert ask you to go out there to do any picketing?

A. No.

Mr. Rayson: That's all, your Honor. Just a moment.

Q. Mr. Ross, were you in Palmer on August 17, Wednesday?

A. Yes, sir.

Q. Do you remember an occasion where Mr. Paul Callis and Mr. Allison came out of a store?

A. I do. Yes, sir.

Q. What were you doing there on that day?

A. I went to the commissary to get some groceries.

678 Q. Were you alone, or did you have somebody with you?

A. No. I had a, between a five and a six year old girl in the truck with me.

Q. All right. Now, what did you see when you got into Palmer that afternoon, with reference to Mr. Callis?

A. Well, I come in—I lived behind the company store, and I come in the side road and pulled in to the porch at the store, and Paul Callis and M. L. Gary was all standing there on the porch. Gary had a-hold of Callis's arm——

Q. Did you see Mr. Gray take hold of Mr. Callis?

A. No. He had a-hold of him when I pulled in.

Q. Did you hear a conversation that took place between Gary and Callis?

A. Yes, sir.

Q. What was it?

A. I heard Gary cussing him a lot.

Q. Why was he doing that? Do you know?

A. Well, he was going on about him having the T. B. I. men out there, and having him take a lie detector test, and about some copper wire being gone out of the basement, and also something about his wages, bringing that all in.

Q. What sort of work does Gary do?

A. He was a night watchman, and has been a night watchman in a commissary.

679 Q. Do you know whether or not he had been accused of—had he taken something from the commissary?

A. No. He didn't say he had been accused; he just kinda' left the impression that it was kinda' left up to the three of them, and then——

Q. Is that what Gary was talking to Mr. Callis about, that day?

A. That's what he was talking about.

Q. All right, sir. Now, were there anyone else that was about Mr. Callis?—any other coal miner? Gary wasn't a coal miner, you say, he was a night watchman. Were there any coal miners?

A. No. I didn't see none. There was a old man, a'settin' down under a tree, and he's dead now.

Q. Anyone else?

A. I remember him.

Q. What about Chief Gary, did you see him?

A. No. I didn't. He could have been there, and I just couldn't have seen him. I don't remember seeing him there.

Q. How long did Gary and Callis talk?

A. Well, just a very few minutes, after I got there.

Q. What was Gary's condition? Was he completely sober, or what was he?

A. Well, I couldn't tell you drunk; he acted kindly unusual, I guess, and mad, unusual.

Q. Could you tell whether or not he had been drinking?

680 A. Sir?

Q. Could you tell whether or not he had been drinking?

A. Well, I don't believe I could swear to it, but I could tell he was unusual, or something, or mad, or something like that?

Q. All right, sir. Well, what did Mr. Callis do after Gary and he had concluded their conversation?

A. He got in his car and left out.

Q. Did you see him get in his car and leave?

A. Yes, sir.

Q. Did anybody precede him, or follow him?

A. No, sir. I did not.

Q. Did you see anyone following him?

A. No, sir. I did not.

* * * * * * *

681 **Cross-Examination,**

By Mr. Van Derveer:

* * * * * * *

682 Q. And you threw up a picket line on him and kept——

A. Oh, yes, sir.

Q. Well, did Stanley Meeks ever open?

A. I didn't say we throwed up a picket line.

Q. Well, you kept it from opening, didn't you?

A. No.

Q. Did he ever open?

A. No.

Q. You did picket though, didn't you?

A. No. Nope, we sure didn't.

Q. Just went to it?

A. We went to it. Yes, sir.

Q. Told him he'd better not——

A. In this situation, no. We did not. We told him we'd been promised that, and he had union men in the truck with him, and he says, under them conditions I wouldn't to and I'm sure my men wouldn't.

Q. Did you tell him what you'd do to him if he did open it?

A. Sir?

Q. Did you tell him what would happen to him if he did?

A. I did not. No, sir.

Q. Did you have your gun with you?

A. Sir?

Q. Did you have any guns with you?

A. No, I did not.

683 Q. Now, on this picket line that you were on out there did you ever see any guns?

A. No.

Q. Never did?

A. I can't say that I did.

Q. Not a one? Everybody was dressed up and very peaceful there, were they?

A. Well, they didn't go dressed up.

Q. Never raised their voice about anything, did they?

A. Not the tour that I was on.

Q. Never said a harsh word to anybody, did you?

A. Nope, I didn't. Nobody come by.

Q. Nobody touched anybody else, did they?

A. Nobody come by there.

Q. Now, Mr. Ross——

A. They had no cause to.

Q. Now, Mr. Ross, don't you know there were guns on that line every day?

A. There could have been, but I didn't see them.

Q. But they were there, weren't they?

A. No, I didn't see them. I wouldn't say they were there.

Q. Now, you at the present time are working down there in Grundy Mine Number 11. That's a big mine, isn't it?

A. That's right. Yes, sir. I helped in opening the mines up.

684 Q. That's right. And how much do you make a day?

A. $23.85.

Q. And you're working a full shift?

A. That's right.

Q. And you don't have a contract with the United Mine Workers?

A. Well, our union officials insist that we do, but I guess——

Q. Whether there is or not, then, you don't know. Is that it?

A. Well, that's not for me to say. When we're under contract to work then I abide by it.

Q. So far as you know is there or is there not a contract?

A. I don't know.

Q. But at any rate there's been no reduction in your pay, in any way, has there?

A. No. No reduction.

Q. No reduction in any benefit in any way has there?

A. No, sir.

Q. And you're making just the same as you would whether there was or was not a union contract. That's right, isn't it?

A. I didn't get that.

Q. You're making the same pay that you would even if there was a union contract?

A. No, I don't think so there. I couldn't agree with
685 you there. I have worked where there was no union and I certainly didn't get nothing like that.

Q. No. Perhaps I didn't make my question clear. What you are being paid right today for working at that Grundy Mine is the union scale?

A. Yes.

Q. Now, if there is no contract between your union and Grundy today there has no reduction in your pay in any way?

A. There's been no reduction in my pay so far.

Q. All right. Now, back on the events that took place over there at Palmer that day. On the 17th everything was very quiet, was it not? On the 17th, the day you went over to get the groceries at the commissary?

A. Yes, sir.

Q. There was no great big number of people in town, was——

A. No, there was not. No.

Q. Wasn't anybody but just a few people walking around——

A. That's right; just a few.

Q. You didn't hear any harsh curse words said, did you?

A. Yes, I heard some cuss words. Yes.

Q. Just that one time?

A. That one man.

Q. That's all. Mr. Callis and Mr. Allison and this one fellow that was in the area was the only ones there——

A. The only man that I seen that was involved in any way.

686 Q. There was no one goofing around then, was there?

A. No. No.

Q. No cars trying to block their way?

A. No, sir.

Q. They didn't have to get out of there in a hurry, did they?

A. No, sir.

Q. It looked like a quiet Sunday morning, didn't it? That's about the way it looked, wasn't it?

A. Well, it was an ordinary day——

Q. Come off of that, now, and——

Mr. Rayson: Your Honor, we object to those remarks that Mr. Van Derveer——

Mr. Van Derveer: Well, if I made remarks I did it inadvertently and I owe an apology to counsel there. I didn't——

The Court: Just a moment. I suggest we go on.

Redirect Examination,

By Mr. Rayson:

Q. Mr. Ross, your union has told you to keep working at the mine now, have they not?

A. Yes, sir, they sure have.

Q. And you understand that they're trying to work out some arrangements with Grundy right now, do you not?

A. Yeah. They're trying to work a contract out for us to keep on our jobs with the same pay, and also the
687 management has asked us to do that.

Q. Yes, sir.

A. In order to hold the T. V. A. contract. The management told me to stay on the job and now also the union representatives, too.

Q. Are your union dues being deducted by the company now?

A. Sir?

Q. Are your union dues being deducted by the company now?

A. Yes, sir.

* * * * * * *

CLARENCE McGOVERN.

(After being duly sworn the witness testified as follows:)

Direct Examination,

By Mr. Kramer:

Q. Your name is Clarence McGovern?

A. Yes, sir.

* * * * * * *

688 Q. Where do you live?

A. Palmer, Tennessee.

Q. What is your occupation, now, and has been through the years of your employment?

A. I've been a miner up until—I believe I went to work

for the state highway department up in November of 1961.

Q. Prior to that, you had worked as a coal miner, how long?

A. Thirty years.

Q. Where had you worked?

A. At Palmer.

Q. For what company or companies had you worked?

A. Tennessee Consolidated Coal Company.

Q. What kind of work did you do for Tennessee Consolidated over these years?

A. Well, I done different things; different classified jobs, you know; several different things.

Q. When did you last work for Tennessee Consolidated?

A. I believe it was March the 15th, 1960.

Q. Was that the date of the cancellation of the collective bargaining agreement between the United Mine Workers and Tennessee Consolidated became effective?

A. Yes, sir.

Q. Have you worked any since then?

A. Yes, sir.

689 Q. As a coal miner?

A. Yes, sir.

Q. When did you next work as a coal miner?

A. Let's see. I believe I went back to work in August, after Alvin Garcia took over the job.

Q. That would be August, 1962?

A. Yes, sir.

Q. The August just passed. All right, what mine——

A. No. That would be August of '61.

Q. What mine were you working at when the occurrence happened in August? What was the last mine you had worked at, rather before the occurrence in August, 1960?

A. Coal Valley.

* * * * * * * *

Q. All right. Were you present on either August the 15th or August the 16th, Monday or Tuesday, 1960, when some people gathered over there?

690 A. Yes.

Q. When did you first learn that this mine was about to be opened, or there was talk of opening it, on this Monday, August 15th?

A. I believe it was on Saturday, and that would have been August the 13th.

Q. Prior to this, some months before, had you heard any conversation by Mr. Paul Callis, with reference to the opening of the mine at this particular location?

A. Yes, sir.

Q. Where was that conversation, and what did he say?

A. That was in the Palmer Bathhouse.

Q. Who was there?

A. The night men. The men that works on the night shift.

Q. On the night shift at what mine?

A. At the Coal Valley Mines.

* * * * * * * *

691 Q. What did Mr. Callis say at that time?

A. Well, he's wanting us to talk to the men over there, he wanted to start stripping out—you'all will have to pardon me, I'm hoarse, and I've been to the doctor today——

Q. Take your time.

A. But he wanted to make a statement to the men 'cause the men knew that that Coal Valley Mine was going to work out.

Q. In other words, the coal was pretty near exhausted then?

A. Yes, Yes, sir.

Q. All right?

A. And I asked him myself, I said, "Paul", I said,

"what are you going to do with the Coal Valley men as they work out." He said, "You fellers next work
692 will be in Gray's Creek." He said, "we're going to start developing over there and we're going to move you Coal Valley men, as you work out, to Gray's Creek."

Q. Do you know about how long that was before this incident in August, 1960?

A. I wouldn't be for sure, but it was sometime, I'd say approximately a year. I don't know for sure. I don't remember——

Q. Later on, did he have another conversation with you?

A. No. Not with me.

Q. I see. You weren't present at any other conversation?

A. No, sir.

Q. Now, when did you first learn to tell us that there might be an opening of the Gray's Creek Mines, on Monday, the 15th of August, 1960?

A. The 13th, I believe. On Saturday before Monday.

Q. Do you recall how you learned of that?

A. Well, it was the general talk among the men. It had gotten out some way, and was the general talk.

Q. Among the men who had been promised the Gray's Creek job?

A. Yes.

Q. Was there anything done between then and Monday that you know of, by those men, or by a local?

A. They had a meeting, I believe, on Sunday evening.

Q. Was that a regular meeting or was it a called meeting?

A. It was a called meeting.

Q. Do you recall how you received notice that there
693 was going to be a called meeting of the local?

A. No. I was a little late getting there, but I saw

a bunch of cars. I was coming into Palmer, right there, somewhere, and I saw a bunch of cars over there, and I asked what it was, and they told me, and I went.

Q. Now, that bunch of cars were where?

A. They'd parked over where the local union meets. They meet over at the——

Q. In Palmer?

A. In the gymnasium. Yes, sir.

Q. Did you go on into the meeting?

A. Yes.

Q. Were there any district officers there?

A. No, sir.

Q. Any district officials of any kind there?

A. No, sir.

Q. Any International officers there?

A. No, sir.

Q. What transpired at that meeting that afternoon, in that local hall?

A. Well, they just had a general talk about it. They discussed about trying to start those mines in Gray's Creek.

Q. Was there any formal action taken?

A. No, sir.

Q. After the meeting broke up, what happened?

694 A. Well, when the meeting broke up, I believe Eli Hue Meeks said he thought he'd ride over Monday morning and see what they was going to do, and there was two of us that told him we'd go with him.

Q. Who was the third man? Eli Hue Meeks was one, you were one; who was the third one?

A. Louis Tate.

Q. Louis Tate?

A. Yes, sir.

Q. On Monday morning, what did you do, if anything?

A. We went to Gray's Creek.

Q. Who went?

A. Louis Tate, Eli Hue Meeks, and me, all in Eli Hue's truck and there was two more guys that was there when we got there——

Q. Now, you three—pardon me—you three went over together?

A. Yes, sir.

Q. Where did you go to?

A. We went down to the foot of the mountain, where the mines was supposed to be opened up.

Q. How did you know that the foot of the mountain, there at Gray's Creek Mine, was to be opened?

A. Well, it had been bull-dozed off for some time; approximately a year, or longer.

Q. Is it the usual procedure to bull-doze off an area
695 before you open a new mine of this type?

A. Yes, sir.

Q. When you got down there in that area, about what time do you think it was when you got down to the area that had been bull-dozed off?

A. Well, it was pretty early. I'd say in the neighborhood of—it was around six o'clock or six-thirty probably. I don't know exactly.

Q. Who did you see there when you arrived?

A. Paul Gibbs.

Q. Anybody else?

A. No, sir.

Q. Any men with him?

A. No, sir.

Q. Mr. Gibbs have any tools or equipment of any sort that you saw at the mine?

A. I didn't see it. No, sir.

Q. Tell us what was said, and what occurred when you three met Mr. Gibbs there?

A. He was standing right beside of his truck, and he

said he was trying to decide whether to go around and go through Coal Valley, or go back up the mountain, and I said——

Q. Just a minute, just a minute. Explain what you mean when you say "go around and go through some place or go back up the valley?"

696 A. Well, they'd been a stripping place down there, you know, and there was a road that goes around and goes plumb around the foot of the mountain and they used it to haul coal out of Coal Valley.

Q. Is that one road that he could leave there on and go around, and the other one goes back to where you had gone in?

A. Yes, sir.

Q. All right. Now, I asked you what Paul Gibbs did?

A. He said he was just standing there, studying whether to try to go around through there, or try to go back up the mountain, and I believe I'm the one that told him, I said, "I imagine the best road would be back up the mountain, the way that we come in."

Q. What else was said there that morning?

A. I told him that we heard there was going to be some mines opened up in there, and I asked him if he had heard it, and he said he'd heard something about it.

Q. He had heard something about it?

A. Yes, sir.

Q. What else did Mr. Gibbs say there to you people, except that he had heard something about it?

A. That's about all we done. I went on talking to him about it. I asked him about how many trucks, and he said he had a gravel hauler, or something, and he had some trucks down in Florida, and I asked him how many trucks he had, and I believe he told me, and then

697 he, I believe, he wasn't there too long, and he left.

Q. Was there any argument of any kind?

A. No, sir.

Q. Did he say that he was there that morning for the purpose of opening a mine at Gray's Creek?

A. No, sir.

Q. Did he give any indication in any way, while he stayed there, that that was his plans?

A. No, sir.

Q. He left there. Did you see him later that morning?

A. Yes. I saw him leave.

Q. You saw him leave. What did you people do after he left?

A. Well, after he left, I'd say it was approximately ten minutes; he couldn't have had more than time to have been where the Gray's Creek Road turned off onto what we called the Pocket. You know, where a lot of those mines are, and he couldn't have had more than time to get to that Pocket Road until a car come in there with Kentucky license on it, and there was three men in it, and one of them got out, and said, "Is this where they are going to start to work, this morning?" Some of us spoke up and told him if the Coal Valley men started it was going to start, and he stood around there approximately five minutes, and said, "Well," he said, "If there's not any work going on in here, I don't see no point in me a'staying," so they left.

Q. What, if any, answer did he make to the state-
698 ment that was made to him, that if Coal Valley men started the mine would be started?

A. I don't think he said anything. I don't remember him saying anything.

Q. Was he cursed, or was there any trouble at that time?

A. No, sir.

Q. Any guns drawn?

A. No, sir.

Q. Any difficulty of any kind?

A. No, sir.

Q. Did you know that man?

A. No, sir.

Q. He had how many men with him?

A. Two more.

Q. Did the other two say anything at all?

A. They didn't get out.

Q. They never got out of the car?

A. No.

Q. You stayed there, you say five minutes or so, and then what happened?

A. Well, after he left, I imagine, I don't know, we probably stayed around there for ten minutes, and we came out where the Gray's Creek Road turns off of the Pocket Road, and we thought maybe, they said, "Well, they might let us come in the other way around——"

699 Q. Do you mean your own group was talking here, is that it?

A. Yes, sir. The three of us.

Q. All right. The three of you talked a little bit, and then what happened?

A. Well, we decided that two better go back down there and check, and I told them, I said, "I'll stay here and see if anybody comes in." The two fellers, Elihue Meeks and Louis Tate went back down there.

Q. Those were the other two that were with you when you got up here to this intersection, and they turned around and went back down to where the bull-dozed place was?

A. Yes, sir.

Q. And you stayed up here?

A. Yes, sir.

Q. At the intersection. All right. What happened after that on this Monday morning?

A. Well, they was gone a little long, and so when they come back they said five men had come in through Gray's Creek, and we decided we'd go back down there and talk to them, and we did.

Q. The three of you people went back down to the place where the bull——

A. Bull-dozed off. Yes, sir.

Q. Did you know the five men that were there, when you got down?

A. No, I didn't know them. Just Elihue Meeks—
700 I think two of them was his cousins, and he told us some of them was. I didn't know them.

Q. Have you ever seen them working around any of the mines before?

A. No, sir.

Q. Had they ever worked in the Coal Valley Mine?

A. As far as I know, they'd not.

Q. What happened when you got down to where those five men were?

A. Well, we told them, we talked to them, and asked them—I believe we asked them how they, we asked them what the Grundy Mine, and they said they heard there was going to be some mines opened up down there, and they was over there to see about a job. So, we told them that we'd been promised that work there and that we was out, too, and that the Coal Valley men had been promised that work there, and if there was any work went on, we'd expect it.

Q. What was their attitude, or what happened? Just tell us what occurred.

A. One of them, I believe it was probably the older man in the bunch, he said, after we explained it, he said, "I can't say as I blame you fellers."

Q. Any trouble there?

A. No, sir.

Q. Any guns drawn?

701 A. No, sir.

Q. Any threats?

A. No, sir.

Q. Were you people drinking, or anything of that sort?

A. No, sir.

Q. Well, after this man said, "I don't know that I'd blame you for it," what did he do, or what did they do?

A. Well, they stayed around for a good while, and we all talked, and they left.

Q. Any trouble of any kind?

A. No, sir.

Q. You say "no guns." Did they have any guns that you saw?

A. I didn't see any.

Q. And you had none with you there?

A. No, sir.

Q. All right. After these five men left, what did you do?

A. Well, I stayed on over there. I stayed until sometime about dinnertime, maybe, and I went on home, but I went back.

Q. Had there been any trouble of any kind when you left, sometime around noon?

A. No, sir.

Q. You came back again in the afternoon?

A. Yes, sir.

Q. While you were gone, did you see any crowds gathered, or trouble anywhere?

702 A. No, sir.

Q. Do you know about what time you came back in the afternoon?

A. Well, it wasn't late. I got back over there pretty early, probably around one o'clock.

Q. How long did you stay that afternoon?

A. I stayed until the next morning.

Q. You stayed through the night?

A. Yes, sir.

Q. Any trouble there at all, during that afternoon or night?

A. No, sir.

Q. How did you spend the night, and where did you spend the night?

A. Well, we spent the night mostly playing setback. Some of the boys came in there and brought some setback cards, and maybe one of them brought a tent, well, they did bring a tent in there.

Q. Do you remember who brought the tent?

A. Harvey Brown.

Q. Harvey Brown?

A. Yes, sir.

Q. Did anybody come here during the night? Was there any trouble of any kind?

A. No, sir.

Q. Why were you over there?

703 A. Well, I was over there account of the interest in my job. I was going to kind of look after it. I'd been promised that and I thought maybe, me out of a job, if they opened up I should have a job there.

Q. Did anybody connected with the District 19, or anybody connected with International ask you to go over there?

A. No, sir.

Q. Paid you to go over there, encourage you to go——

A. No, sir.

Q. You went on your own?

A. Yes, sir.

Q. All right, now, this next day, Tuesday; how early in the morning did you leave there?

A. Well, we left down there where them mines was supposed to have been opened up, I imagine it was some-

thing after six o'clock, and we went around to where the Coal Valley entrance is.

Q. Now, as you left there, had anybody come there that morning?

A. No, sir.

Q. What did you see when you got around to where the Coal Valley entrance was?

A. Well, I would say there wasn't too many men there, and we stayed there—well, three of us stayed there a very short time and we went home.

Q. Was that mine in operation that morning?

704 A. Coal Valley?

Q. Yes?

A. No, sir.

Q. Now, where did you go after you left there then, that morning?

A. Went home.

Q. Did you stay home all day on Tuesday, or were you out anywhere else and saw anything?

A. No. I didn't stay at home all day.

Q. Did you see any trouble that day?

A. No, sir.

Q. Did you go back over to the mine?

A. I don't remember whether I went back that time. I don't know.

Q. When did you—did you go over to the mine on Wednesday?

A. Sometime up in the day, Wednesday.

Q. When you got over there on Wednesday, what, if anything, did you see?

A. Well, there was a few men there, but I was just riding around Wednesday, and some fellers come through Palmer and picked me up.

Q. Did you see anybody armed with any guns?

A. No, sir.

Q. Did you see any disturbance of any kind there on Wednesday?

705 A. No, sir.

Q. On that afternoon of Wednesday, the 17th, were you down in Palmer?

A. Yes, sir.

Q. Were you there when Mr. Paul Callis and Mr. Allison were there?

A. They was leaving about the time we drove up.

Q. You said, "We drove up"?

A. Well, the ones that I was with——

Q. Who were with you?

A. Lee Tate, Floyd Tate and Gentry Tate, I think.

Q. Where did you people drive up to?

A. We drove up to Whitwell. I live up in the holler towards the mine, the coal mine, and we turned in at the company office there, where we always turn.

Q. Is that a store, a public store there?

A. It's between the office and the store.

Q. Between the office and the store. Is that a gathering place when men are not employed?

A. Yes, sir.

Q. From time to time?

A. Yes, sir.

Q. Just tell us what you saw when you drove up there in your own language?

706 A. I didn't see anything. Allison was done in the car and Paul Callis was getting in the car when I drove up.

Q. You had not seen anybody take ahold of Paul Callis?

A. No, sir.

Q. Had you heard any words spoken?

A. No, sir.

Q. Allison was already in his automobile and Mr. Callis was getting in?

A. That's right.

Q. Anybody else in the car with them that you saw?

A. No, sir.

Q. What did they do after they got into this car there that afternoon?

A. They left.

Q. What direction?

A. They went towards Tracy City.

Q. Did anybody that you noticed get in front of them and lead them, or was anybody behind them, following them as they left there?

A. No, sir.

Q. Did you hear anything at all said to them or did you hear any difficulty at all then while you were there?

A. No, sir, I did not.

Q. How long did you stay there at the store?

A. I didn't stay long. I believe Lee Tate, one said——

Q. You didn't see anything else occur that day?

707 A. No, sir.

Q. Were you up there near this mine with some of these other pickets later than that during this next two or three months, or four months?

A. Yes, sir.

Q. How frequently were you up there?

A. Well, I went pretty regular until I started to work for the state.

Q. Did the United Mine Workers, District 19, or the International ever ask you to go on any of those trips?

A. No, sir.

Q. Did they ever pay you anything for being over there?

A. No, sir.

Q. How long would you stay when you would make these trips over during these next few months?

A. Well, I'd stay all night sometimes. There was three at a time supposed to stay at night and I stayed all night.

Q. You took your turn at staying there?

A. Yes, sir.

Q. Were you there for any other purpose than the one you've already told us about, looking after your own job?

A. No, sir.

Q. Do you know how long those pickets stayed there? Do you know how many months on this arrangement you're telling us about?

708 A. I don't know for sure, but it was approximately eight or nine months.

Q. During that period of time were you unemployed?

A. I was unemployed until November the first.

Q. 1961?

A. Yes, sir.

Q. 1960 now or '61?

A. No. 1960 it is.

Q. 1960. That's my mistake. Did you ever receive any food orders from the United Mine Workers?

A. No, sir.

Q. Were you a member of the United Mine Workers of America during that time?

A. Yes, sir.

Mr. Kramer: Cross-examine.

Cross-Examination,

By Mr. Ables:

Q. You say you went down to the Coal Valley or down to the Gray's Creek area on the morning of the 15th. I believe that's correct what you stated?

A. That's right.

Q. You said you heard some rumors about it on the 13th, on Saturday the 13th?

A. Yes.

Q. Could you tell me from what source you heard
709 those rumors?

A. Well, I don't know. It was just rumored around that they was going to start in there.

Q. Who told you specifically?

A. Well, I don't know for sure. It was just rumored around.

Q. Rumored around?

A. Yes, sir.

Q. Then you all had this meeting on the 14th I believe you stated——

A. Yes, sir.

Q. As the local meeting in Palmer?

A. Yes, sir.

Q. Was anybody there who stated that they had called Mr. Gilbert——

A. No, sir.

Q. And told him about it?

A. No, sir.

Q. Well, wasn't Mr. Gilbert your District Representative?

A. He was.

Q. Isn't it the custom that you advise him of your problems? Isn't that what he's there for?

A. He's not advised every time they have a meeting or when they have a called meeting, he's——

Q. Yes, sir. I'm aware of that, but I say—may I ask this? You had a problem there or a potential of
710 somebody taking property or your job that had been promised to you. Now, would not that be of such magnitude that you would advise your District Representative?

A. Well, I didn't call him and I don't know of anyone that did.

Q. Did you hold any position with the union at that time?

A. No, sir.

Q. You were not on the mine committee or anything else?

A. No, sir.

Q. Now, you went down there on the Monday morning, I believe you stated, then you continued on that picket line from time to time for how long?

A. Well, several months.

Q. Several months?

A. Yes, sir.

Q. Do you have any idea if any other mines were affected by that picket line in the pocket?

A. No, sir.

Q. Was Howard Higgins working? Howard Higgins Mining Company, Incorporated, down at the foot of the pocket at that time?

A. Yes, sir. Yes, sir, he was working.

Q. He was working?

A. Yes, sir.

Q. You had a three-man picket line at the entry there, of the road, off of the Pocket Road into Coal Val-
711 ley, into Gray's Creek. Is that correct?

A. Well, there was, I think, there was two lines in the entrance for a while. I don't know where it started first, but also Coal Valley.

Q. Coal Valley had it and also Gray's Creek had it?

A. Yes.

Q. You didn't put a line up at the mouth of the Pocket Road then?

A. No, sir.

Q. You stood duty how frequently, Mr. McGovern?

A. Well, I believe it was Wednesday nights, if I recall right.

Q. Uh-huh. You took the night shift, in other words?

A. Yes, sir.

Q. And you stayed on there for several months?

A. Yes, sir.

Q. Now, during this period of time were you all having regular meetings at the local?

A. Yes, sir.

Q. Did Mr. Gilbert attend any of these meetings?

A. Yes, sir. He was at some of the meetings.

Q. Did you all discuss the picket line while he was there?

A. I have heard him say that he wanted them to maintain order out there and keep it down to what they was supposed to have.

Q. Yes, sir. He knew the picket line was there?

712 A. Yes, sir.

Q. Did he visit you on the picket line?

A. I've saw him out there.

Q. Uh-huh. Frequently or infrequently, or——

A. No, sir, not frequently.

Q. He just asked that you maintain order, is that right?

A. And keep the line down.

Q. Keep the line down——

A. Said he wouldn't allow no drinking in there, serving on the picket.

Q. Uh-huh. You all kept the line down, you say, to about three men? Is that correct?

A. No, I didn't say that. There was a lot of visitors. There was a lot of people that would come by and stop and——

Q. Have a cup of coffee and——

A. Yes, sir.

Q. Play cards or——

A. Yes, sir.

Q. Hunting squirrels or something like that?

A. I don't know about hunting squirrels.

Q. You didn't see any squirrel rifles in the area or any 12-gauge or 16-gauge shot guns?

A. No, sir.

Q. That's pretty well wooded in there, sir, isn't it?

A. Yes, sir.

713 Q. Don't most of you hunt on company property there frequently?

A. Yes.

Q. But you didn't see anybody hunting there any that fall?

A. No, sir.

Q. Or any guns of any nature?

A. No, sir.

Q. Now, I believe you stated on the 17th you drove into town about the time you saw Mr. Allison and Mr. Callis get in their car? Is that correct?

A. Allison was done in the car and Paul Callis was getting in as we drove up.

Q. Who was driving?

A. I was.

Q. Where was their car parked, sir?

A. It was down close to the side entrance to the company office there at Palmer.

Q. You mean there between the commissary and the side entrance?

A. Yes, sir.

Q. Which way did you pull in?

A. I come from up the Whitwell way.

Q. Whitwell——

A. And I turned in to the left.

Q. Turned in to the left?

714 A. Yes, sir.

Q. Did you turn in, and did you get close to their vehicle when you pulled in there?

A. Yes. I got pretty close.

Q. Did you pull a 30 aught 30 on Paul Callis?

A. No, sir.

Q. He said you did, but he was mistaken?

A. He sure is.

Q. You didn't see a 30 aught 30 there?

A. No, sir.

Q. You didn't see a rifle in the crowd?

A. No, sir.

Q. You didn't have one in your car?

A. No, sir.

Q. All right, sir. Now Mr. Gary, M. L. Gary, did you see him touch Mr. Callis?

A. No, sir.

Q. You weren't there at that time?

A. No, sir.

Q. Now, is it true that Mr. Allison had to back up to get his car around your pick-up?

A. Allison wasn't the one that was driving. Paul Callis got in on the driver's side.

Q. Yes, sir. Did Mr. Callis have to back up to get around your pick-up? Did you pull in so close to him?

715 A. No, sir.

Q. Do you mean there was plenty of room to go straight ahead?

A. Yes, sir. He could have went either way.

Q. Could have gone either way, and if he said to the contrary he would be mistaken. Is that right?

A. That's right.

Q. All right, sir. Now, tell me something; you were down there with Elihue Meeks and Louis Tate, I believe you said, on the first morning. Is that correct?

A. Yes, and there was two more fellers in our pick-up truck, like I stated.

Q. Uh-huh. Who did you say they were?

A. I don't believe I said, but it was Harry Hart and Bob Flint.

Q. Harry Hart and Bob Flint?

A. Yes, sir.

Q. Now Mr. Elihue Meeks at that time, was not he a deputy sheriff of Grundy County?

A. I think he was.

Q. Did you see him the next day there in Palmer? I'm talking about the 17th, when you drove in Palmer.

A. No, sir. I didn't see him.

Q. You didn't see him. Well, you said that you had had a few meetings there. Did you all meet regular? Let me ask you once again, now, on this picket line;
716 did you meet quite frequently on that, or once a week, or who assigned the picket duty? How does that work? Did you have your picket committee set up?

A. Pardon?

Q. Who was on the picket committee of the Palmer Local?

A. Well——

Q. At that time?

A. I don't know as we had any committee.

Q. You didn't have a picket committee?

A. Not as far as I know.

Q. Who designated who would be there then? Who was overall in charge?

A. I believe we had a meeting and we just decided—kind of took the names, you know, of the ones, and let them just about pick the time they wanted to go.

Q. Uh-huh. Everybody volunteered?

A. Yes, sir.

Q. You didn't have anybody overall in charge, so to speak?

A. No, sir. Not as I know of.

Q. You say Mr. Gilbert visited you a few times there?

A. I've seen him there. Yes.

Q. Did you all report to him if you were peaceful on the picket line?

A. Pardon?

Q. Did you all report to him that you were main-
717 taining a peaceful picket line?

A. Well, he knew it. I didn't report anything to him.

Q. Do you know of anybody who did in the local?

A. No, sir. I don't.

Q. Were you present when Mr. John Cain was struck, on the 16th?

A. No, sir.

Q. Where were you, sir?

A. Well, imagine I was at home. When we left Gray's Creek that morning where we'd stayed all night, like I told, on Monday night, and we came around to the Coal Valley entrance, but we left—I don't know exactly, there, but we left approximately seven or a little bit after seven.

Q. A little after seven o'clock?

A. Yes, sir.

Q. You were not in the truck or the car convoy that followed up to Junction 108——

A. No, sir.

Q. Through Palmer?

A. No, sir.

Q. You had gone home to sleep?

A. I, I, I'se gone home.

Q. You didn't hear any of the noise?

A. No, sir.

Q. How far do you live from Palmer, sir?

718 A. I live about, I imagine half a mile.

Q. North or South, or towards Whitewell, or what?

A. I live towards Whitewell.

Q. Towards Whitewell?

A. Yes.

Q. Well, didn't that convoy pass right by your house?

A. No, sir. I live more up the holler, towards the old mine.

Q. Towards the old mines up the Coal Valley Holler?

A. Yes, sir.

Q. That doesn't come out of the road that way——

A. Not up the Coal Valley Holler; up the—you turn in at the store, and I live about a half mile up towards——

Q. Uh-huh. Now, may I ask you, sir, how tall are you?

A. Pardon?

Q. How tall are you?

A. I'm about five foot eleven, or five-eleven and a half, or something like that.

Q. How much do you weigh?

A. I weigh about 230 or 235.

Q. You've been in the mines a long time?

A. Yes, sir.

Q. You say that you weren't present when John Cain was struck?

A. I sure wasn't.

Mr. Ables: I believe that's all.

719 **LOUIS TATE,**

(After being duly sworn, the witness testified as follows:)

Direct Examination,

By Mr. Kramer:

Q. Your name is Louis Tate, I believe?

A. Yes, sir.

Q. How old are you, Mr. Tate?

A. 53.

Q. Where do you live?

A. At Palmer.

Q. Palmer, Tennessee?

A. Grundy County. Yes, sir.

Q. What has been your occupation——

A. Mining.

Q. How long have you been a miner?

A. About 35 years.

Q. Where, or what mines have you worked at?

A. Well, I worked at this one of Tennessee Consolidated, and then I went up to Kentucky and worked awhile, and West Virginia.

Q. Then came back and went to work for Tennessee Consolidated again?

A. Yes, sir.

Q. When was this time when you started the second
720 time to work for Tennessee Consolidated?

A. I started in '33.

Q. And you worked continuously for Tennessee Consolidated up until what time?

A. 'Til March 15, 1960.

Q. Account of the cancellation of the contract there?

A. Yes, sir.

Q. By that, I take it, your a member of the United Mine Workers of America?

A. Yes, sir.

Q. How long have you been a member of the United Mine Workers of America?

A. Been since 1933.

Q. Are you employed now as a miner?

A. No, sir.

Q. What are you doing now?

A. I'm with the highway department.

Q. Tennessee Highway Department?

A. Yes, sir.

Q. In this record, there is some evidence about an occurrence that happened over at the mines over there, in

August, 1960—no, it was the Gray's Creek mine. Do you know about that incident?

A. Yes, sir.

Q. When did you first learn that they were going to open up the mine on Monday, or something was
721 going to be done about that opening the mine on Monday, August the 15th?

A. I heard it on Saturday evening.

Q. Could you tell us how you happened to hear it, or where you heard it, just generally?

A. I just heard it around from the men that they was going to open up the mine.

Q. Where were you when you heard it?

A. Over around the company store.

Q. Over around the company store. Now, did you attend any meeting on Sunday, of the local?

A. I was there Sunday, but the meeting was about over, when I got there.

Q. Do you remember how you got word that there was going to be this special meeting of your local?

A. I just heard it around through the men.

Q. Just around through the men. Which local was that?

A. 5881.

Q. And that's the one you belonged to?

A. Yes, sir.

Q. Did you get any official notice from anybody from District 19, or from the International Organization in Washington?

A. No, sir.

Q. As far as you know, was any notice of any such meeting given by them or either of them?

A. No, sir.

722 Q. You got there late, near the close of the meeting. What, if anything, happened after you got there? Of course, you wouldn't know what was there before.

A. There wasn't anything happened. They were——

Q. About ready to adjourn?

A. About ready to adjourn.

Q. After the meeting, what, if anything, did you do?

A. We was on the outside talking, and one feller said that he was going over the next morning and I told him to come by and I'd go with him.

Q. Who was it that said he was going over—I think that's going over to Gray's Creek?

A. Yes, sir.

Q. Who was it that made that statement?

A. Meeks. Elihue Meeks.

Q. Elihue. On the next morning, what did you do, Monday morning.

A. He come up by and we went up and picked up Clarence McGovern and we went over there.

Q. Now, when you went over there, you went over to Gray's Creek?

A. Yes, sir.

Q. Where did you go when you got there in this mining area?

A. We went down to where the mines was supposed to open.

Q. How could you tell where the mine was sup-
723 posed to open up?

A. Well, it had been dozed off for a couple of years, that is the place where the opened one was going to be.

Q. Wasn't that a place of recent dozing off; where bulldozers recently had dozed off?

A. No, sir.

Q. Who was there when you got there?

A. Paul Gibbs.

Q. What happened?

A. Not anything. We talked awhile, and he said that he——

Q. He? Do you mean Paul Gibbs said——

A. Paul Gibbs said he was wondering if he could get around through the strip field to the old Coal Valley mines, and one of them told him they didn't know, and that it might be pretty rough.

Q. One of them? That's one of you three?

A. One of us.

Q. Do you know which one of you three——

A. No, sir. I don't know which one it was, but he went back up the hill where we came down.

Q. Was anybody with Mr. Gibbs?

A. Do what?

Q. Anybody with Mr. Gibbs?

A. No, sir.

Q. He was already there when you got there?

A. (Nodded "Yes".)

724 Q. Nobody else came up to him while you were there. Did he have any equipment to open a mine with—shovels, picks, or anything at all that you saw?

A. I didn't see anything.

Q. He left there and went which way?

A. Well, he had a mine in the Pocket, and I thought maybe he was going back to the pocket mines. I don't know.

Q. Went back in that direction?

A. (Nodded "Yes".)

Q. Were there any threats made against him at that time?

A. No, sir. There wasn't a harsh word spoken.

Q. Was there anything said about opening a mine there?

A. I believe that McGovern, I think it was, asked him, and said he had heard there was a mine going to be opened up there, and had he heard anything about it, and he said he had, but he didn't say who was going to open it or what.

Q. Didn't say whether he had any connection with it or not?

A. Didn't say a word.

Q. How long after Mr. Gibbs left, did you people leave, if you did leave?

A. Well, sir, it was some 15 or 20 minutes, I guess.

Q. The three of you?

A. Yes.

Q. Where did you three gentlemen go?

A. We went back on top of the mountian, and then two of——

725 Q. Is that up to about the forks of the road, there?

A. Yes, sir.

Q. All right. You got up as far as the road, and then what occurred?

A. We went back down there, and there was a——

Q. All three of you go back down?

A. I don't remember whether we did or not. I believe one of them went home, or stayed up there, or something. I don't know.

Q. Two of you went on down there. All right, now what occurred after you got back down there, where the mine was building——

A. There was a truck with five men, there, when I got back down there.

Q. Do you know who the five were?

A. No, sir. I didn't know any of them.

Q. Do you know whether there was a license plate that attracted your attention on that truck?

A. It had a license. Yes, sir.

Q. After you got there, what happened then when these five men came in?

A. They said they heard that a mine was going to be opened up and they wanted to come over to see if they could get a job. McGovern, I think it was, told them how

the work was supposed to be there, that it had been
726 promised to the men from Coal Valley, and one of the men—well, I didn't know any of them—he told them how it was, and one of them said, "I don't blame you if it's that way".

Q. What was it that he told them about how it was?

A. About the mine, that the work there had been promised to us when the old mines worked out.

Q. Did you tell them you had been employed there before you people were?

A. Do what?

Q. You people had been employed there before?

A. We'd been employed at the old mines of the Tennessee Consolidated Company, but they cancelled the contract and then shut it down.

Q. When you people told them that you'd been employed there, and the jobs had been promised to you when the mines opened, what did these people say?

A. Well, one of them said he didn't blame us, and then another one spoke up and said, "if you're ready to go, I'm ready to go", and then they got in the truck and drove off.

Q. Any threats made against them?

A. No, sir.

Q. Any guns drawn?

A. No, sir.

Q. Any difficulty of any kind?

A. (Nodded "No", two or three times.)

727 Q. How long did you people stay there after that?

A. Well, about that time, there was another car coming down there with three in it, and one of them asked was they going to open up the mines, and McGovern told them, I think it was McGovern, said if they was opened, why we want it to be opened with Coal Valley men, that we'd been promised the work, and I didn't know who he

was, but after he left they said he was a fellow by the name of Cain, an organizer. He said, "If that's the way it is, I don't see any point in me staying here", so he drove off.

Q. Did you know him before this?

A. No, sir.

Q. Did he give you his name as Cain?

A. No, sir.

Q. He drove on off, though?

A. Yes, sir.

Q. Any trouble with him?

A. No, sir.

Q. Any guns drawn on him, or anything of that sort?

A. No, sir. No reason for trouble.

Q. How long did you stay there that day?

A. I went back out there that night, and stayed all night.

Q. What time in the day did you leave, before you——

A. Well, I guess around twelve o'clock. I don't know.

Q. Then you came back later and spent the night there?

A. (Nodded "Yes".)

728 Q. Do you know how many spent the night there?

A. No. I don't know. Five or six, maybe.

Q. Was there any trouble that afternoon?

A. No, sir.

Q. Any guns drawn or threats made?

A. (Nodded "No".)

Q. Did Mr. Gibbs come back that afternoon that you saw them?

A. I didn't see him if he did.

Q. Didn't see him. The next morning, what happened?

A. Well, I got out to the Coal Valley Road and I was riding with a man, and he said "stop", and I stopped. This feller had been there a few minutes, this feller they

said was Cain, I wouldn't know him if I was to see him now——

Q. The same fellow you had seen the day before?

A. The same one as the day before——

Q. Who was with you?

A. He drove up in there and stopped, and——

Q. Who was with you at that time?

A. Robert Franklin Nunally and Bedford Glisten. I was riding with Robert Nunally, I didn't have no way off the hill, so I just waited and rode with him.

Q. What happened, or what did you see happen there, that morning. This is Tuesday.

A. In a few minutes, Paul drove up there with maybe five, six, or seven cars with him; they drove up
729 and they crowded up there, and that's about all I seen.

Q. Mr. Gibbs came up there with several cars with him?

A. There had been cars stopped out on the highway that wasn't even out on the picket line. They'd been stopped out on the highway. There were several cars, but I don't know how many.

Q. Now, what was said when Mr. Gibbs came up with two, or three, or four, or whatever number of cars there were with some other men?

A. They was crowded up and I didn't hear what was——

Q. Did you hear what was said?

A. No. I didn't hear anything.

Q. Did you say anything?

A. No. I did not.

Q. Did you see any guns drawn?

A. No, sir.

Q. Any effort made to draw guns on Mr. Gibbs, so far as you saw?

A. No, sir. They was crowded up there, and I was back up off the road, and I couldn't see.

Q. It was crowded in there, and you didn't get up close enough to see. Did you hear or see anything that occurred toward this man Cain?

A. No, sir.

Q. You didn't see anything that happened to him?

A. (Nodded, "No".)

730 Q. How long did you stay there?

A. Ten or 15 minutes. I left out and they all come, too.

Q. I didn't get that?

A. I left out, and went to my home, went to Palmer, and then the rest of the cars come on down the mountain and stopped there at the store.

Q. Did you see Mr. Cain leave there?

A. No, sir.

Q. You don't know when he left there?

A. I don't know.

Q. You didn't see anything happen to him there, or any of his papers, or anything?

A. No, sir.

Q. Did you hear anything at all said to Mr. Gibbs?

A. No, sir. To tell the truth about it, that was about the second or third time I'd ever seen Paul Gibbs in my life.

Q. You had no personal contact with him?

A. No, sir. Not a bit.

Q. You left there and went on home?

A. Yes, sir.

Q. Did you see anything else happen during that day?

A. No, sir. I didn't.

Q. Now, on the next day, Wednesday, were you down at the store on that afternoon, when anything occurred down there?

A. No. I wasn't down there.

731 Q. You didn't see any occurrence that took place there, that day?

A. No, sir.

Q. You had nothing to do with it, of course. How often did you go to this place where the pickets were, during the next three, or four, or five months, or whatever the period was?

A. Well, we took it time about——

Q. How many would be there at a time?

A. Three at a time mostly. Of course some of the people would come by and stop, and sometimes there would be seven or eight, but they wasn't on the picket line. It was just three at a time. It took three at night and three during the day.

Q. Did you see any trouble up there at any time?

A. No, sir.

Q. Do you know where Mr. Gibbs' other mine was, down in that neighborhood?

A. We could hear shots. Some of us there heard shots, and they said it was Paul Gibb's Mine.

Q. What you meant was that it was dynamite or explosions where they're operating a mine. To get the coal down, is what you mean by shots?

A. (Nodded "Yes".)

Q. Well, did you see Mr. Gibbs around there at any time that you recall, after these first few days?

A. No. I don't think so.

732 Q. Don't remember ever seeing him?

A. I was there at night. I stayed at night all the time.

Q. You generally stayed there at the night time?

A. Yes, sir.

Q. You never saw him come there at any time?

A. No, sir.

Q. Were you present over at what's been called the "bathhouse" here, when Mr. Callis made a statement to the man about the job would be theirs when that mine was opened?

A. Yes, sir.

Q. Do you know about when that was that he made that statement to the men?

A. No. I don't.

Q. Do you know how many men were there when he told them that?

A. Well, the whole night shift was there. He may have talked to the night shift, and waited for the day shift to come on, and he may have talked to them. I imagine it was about 40 or 50 men worked on that shift.

Q. Working on the two shifts at that time?

A. No. There were 40 every night and 40 every day.

Q. Oh. About how long do you think that was before this time in August, 1960, or whenever you started in to open that mine?

A. I don't remember. It was a pretty good while, though.

Q. Did anybody connected with District 19 of the
733 United Mine Workers, ever give you any instructions or directions about what you were to do there, about this picket line, and so on?

A. Well, they did, yes.

Q. What instructions did you get?

A. Every man got instructions that there would be not over three, and no violence.

Q. Anything else at all? Any directions of any other kind?

A. No, sir. I never heard any.

Mr. Kramer: That's all.

Testimony of Louis Tate

Cross-Examination,

By Mr. Van Derveer:

* * * * * * * *

739 Q. Mr. Tate, do you know whether, or not Mr. Turner called Mr. Gilbert in Middlesboro?

A. Sure don't. No, sir.

Q. You don't know. You're just not testifying one way or the other. Now you told this jury, this Court and jury, that you were a member of the Mine Workers, in good standing, and that was your job, down there, at the Gray's Creek entry. That's correct, isn't it?

A. That work had been promised to us. Yes.

Q. Wasn't Clyde Meeks also a member of the United Mine Workers, in good standing?

A. Clyde Meeks?

Q. Yes, sir.

A. I don't know the man.

Q. Mr. Otter Forsyth, a young fellow?

740 A. I don't know the man.

Q. Mr. Willie Carl Fults?

A. (Nodded "No".)

Q. You don't know him either. And Mr. Alfred Davis Anderson?

A. No, sir.

Q. Mr. Dempsey Campbell?

A. I've seen Dempsey. Yes.

Q. He's a member of the United Mine Workers, in good standing, just like you.

A. He might be. I don't know.

Q. Well, you've seen him, and you know him, don't you?

A. He don't belong to the union out there. I know that much.

Q. Whether he belongs to 7881, or 7083, you don't know, do you?

A. No. I know he don't belong to 5881.

Q. Now, Mr. Tate, are you telling—is it your testimony to this Court and jury that you did not sit right there in that car at the intersection of Coal Valley Road and 108, and see Johnny Cain whipped?

A. No. I never seen him whipped.

Q. I'm going to hand you some photographs here that have been introduced into evidence. One of them is Plaintiff's Exhibit Number 11, and ask you if that isn't the intersection where this beating took place?

A. Well, that looks like it. Yes.

741 Q. That's where the beating took place, wasn't it? The beating that you saw?

A. No. I didn't see no beating. That's where they was stopped that morning, but I didn't see any beating.

Q. Let me hand you another one here, that's number 12, and ask you if that isn't where the beating took place?

A. As far as I know there was no beating took place there. That looks like it was took from the Whitwell side of the road; from the side of the mountain, going to that place.

Q. That's where it happened, wasn't it?

A. Well, I don't know. I said it looks like the road coming from Whitwell. That's what it looks like. I don't know.

Q. There was a fire there, where Johnny Cain's brief case was burned up, in your plain sight, wasn't there?

A. Not in my plain sight.

Q. Sir?

A. It wasn't burned up in my sight.

Q. But you saw it burning?

A. No. I never seen it.

Q. You knew it was burning?

A. I didn't know a thing in the world about it.

Q. You were told about it?

A. I might have been, but I didn't see it and I don't think I should tell about anything that I didn't see.

Q. What you're saying, was that a car blocked
742 your view, is that it?

A. There was a bunch of men there, and a car, I guess, and——

Q. Mr. Tate, you knew exactly what was happening?

A. I didn't know what was happening.

Q. You saw that mob, didn't you?

A. There was a bunch of men there. I wouldn't call it a mob. They didn't, what I seen, they didn't show any violence.

Q. You saw fire?

A. I might have seen some smoke there, but I didn't pay no attention to it.

Q. Come on again. You saw smoke there, didn't you?

A. Yes. Could have been that somebody had a fire there, warming, so far as I know.

Q. A fire in August, Mr. Tate?

A. Yeah.

Q. To keep warm by?

A. Yeah. A good man could get cold in August. I have.

Q. They had him buffaloed with those guns?

A. I didn't see any guns.

* * * * * * * *

744 **HARVEY BROWN.**

(After being duly sworn, the witness testified as follows:)

745 **Direct Examination,**

By Mr. Kramer:

Q. Mr. Brown, how do you sign your name?

A. Harvey.

Q. How old are you?

A. 49.

Q. Where do you live?

A. I live six miles beyond Palmer.

Q. What is your occupation?

A. I work at the tip of 59.

Q. For what coal company now?

A. Well, I don't know what it is now. It was Tennessee Consolidated Coal Company the last work that I did. I haven't worked since the 7th or 8th of June.

Q. The 8th of June of this year?

A. Yes, sir.

Q. At that time, you were working for Tennessee Consolidated Coal Company?

A. Yes, sir.

Q. How long had you worked for Tennessee Consolidated Coal Company?

A. I went to work for them in 1934.

Q. What kind of work have you done as a coal miner, since '34?

A. Well, I've worked on the track, and I've worked on the haulage, and I've worked on the tip.

746 Q. Have you, during this time when you're working these three different jobs, been with Tennessee Consolidated all that time?

A. Yes, sir.

Q. Are you a member of the United Mine Workers?

A. Yes, sir.

Q. How long have you been a member of the United Mine Workers?

A. Since 1933 or 34.

Q. In August, 1960, did you know about any occurrence over at the mines?

A. Over at Gray's Creek?

Q. Yes. Gray's Creek?

A. Yes, sir. The only thing I know was that we had a picket line out there on the 15th of August, I believe.

Q. When did you first hear that they might be going to open those mines on Monday, the 15th of August?

A. It was either Friday or Saturday.

Q. Do you recall how you heard it?

A. Well, I just heard it there in the little town there, at Palmer.

Q. Do you know who told you, or how you picked up this information?

A. No. I don't remember.

Q. Something was said in here about a meeting of the local over there on the Sunday afternoon of the
747 13th or the 14th. Were you there?

A. Yes, sir.

Q. How did you learn of this meeting.

A. I believe that there was a notice posted, and they got around, and called it on the telephone, and just passed it on from one to the other that they was going to call a meeting on Sunday.

Q. Did you go to that meeting?

A. Yes, sir. I did.

Q. What happened at that meeting?

A. Well, it was about some problems over there, that they said that Paul Gibbs was going to go into Gray's Creek and open up the mines over there, that was promised to the employees that worked at the Coal Valley Mines.

Q. Was there any representative of District 19 at that meeting?

A. No, sir. There wasn't.

Q. What final result, or what action was taken, if any? What happened when you broke out?

A. They discussed it a while and then adjourned. There was no action taken.

Q. Did you agree to do anything, or did you do anything as a result of that?

A. No, sir, I didn't.

Q. On Monday, the 15th, the day following this meeting there at the local, did you go over to the mine?

748 A. I went over about 12 or one o'clock.

Q. What did you see? You weren't over there in the morning?

A. No, sir.

Q. When you got over there at Gray's Creek about 12 or one o'clock, what did you see?

A. Just some of the coal miners was over there.

Q. Some of the people that had been employed there before?

A. At the Coal Valley Mines.

Q. At the Coal Valley Mines? In other words, some of the Coal Valley miners?

A. Yes, sir.

Q. Was there any disturbance going on?

A. No, sir. There wasn't.

Q. Did you see any guns?

A. No, sir. I didn't.

Q. Hear any cursing?

A. No.

Q. Mr. Gibbs there?

A. No, sir.

Q. How long did you stay there, when you got over there about noon that day?

A. I stayed, I guess, until around nine, and then I went back home, and went back that night and stayed all night.

Q. And when you got back that night, was there any disturbance there?

749 A. No, sir.

Q. How many of you stayed that night, as near as you can recall?

A. I picked up Louis Tate and Clarence McGovern when I went over there.

Q. You don't know about Clarence having been over there earlier in the day?

A. Well, he could have been——

Q. Well, he told you, but that isn't competent. Anyway, so you picked him up and took him back that afternoon?

A. Yes, sir.

Q. You spent the night there?

A. Yes, sir.

Q. Was there any disturbance or trouble there that night?

A. No, sir. There wasn't.

Q. See anything of Mr. Gibbs around there at all?

A. No, sir. I didn't see him.

Q. What about the next morning; Tuesday morning, the 16th?

A. Tuesday morning, we left down there, I'd say about 6:30 or 15 until seven, when some new men come in.

Q. Somebody else came to replace you as pickets?

A. Yeah. And we went on over to the Coal Valley Road and I guess we stayed there until around seven o'clock, and Clarence McGovern, and Frank Scruggs, and myself, we went on in home.

Q. Did you see Mr. Gibbs before you left there?

750 A. No, sir. I didn't.

Q. You didn't see any trouble or any difficulty of any kind, there?

A. There wasn't any trouble that I saw.

Q. Wasn't any at all there. On Wednesday, the 17th,

were you down in Palmer when there was any trouble or difficulty?

A. I drove up in Palmer——

Q. What time of the day was that?

A. Well, I don't recall.

Q. The afternoon, the morning, or when?

A. It was in the afternoon——

Q. What did you see when you got there?

A. Well, all I seen was Paul Callis, and they said it was Mr. Allison. I don't know him.

Q. You didn't know Mr. Allison?

A. No, sir.

Q. Paul Callis and some other gentlemen was there and what was going on that you saw?

A. They were getting in the car when I drove up.

Q. Had you seen any difficulty with Mr. Callis before that, by anybody?

A. No, sir.

Q. Heard anybody giving any cursing or anything toward him?

A. No. I didn't.

Q. Did you see them, then, leave there?

A. Yes, sir, they left out in the car.

* * * * * * * *

751 Q. Did anybody, in any car, leave that group there and follow them, so far as you saw?

A. No. I didn't know that there was anything wrong.

Q. Did you see anything to indicate that there was any trouble or disturbance about?

A. No, sir. The only thing, when I drove up, there was some men standing over there, and of course I didn't know there was anything wrong until they had done gone.

Q. Was any big or unusual crowd there that afternoon?

A. Yes, sir.

Q. Is that a common gathering place around there?

A. Yes, it is.

Q. And you saw nothing at all unusual after you got there?

A. No, sir.

Q. Did you stay as a picket at any time during the next three or four months over there? Did you serve as a picket over there any day or night?

751A A. Yes, sir, I served on Wednesday night.

Q. Each Wednesday night?

A. Each Wednesday night.

Q. You'd spend the night there. Now, how many would there be of you?

A. Well, there was usually about three of us, and then they'd be outsiders come by, on the highway going into the Pocket, and we'd have people stopping there during the night.

Q. Was this near the public highway where everybody could see it?

A. Yes, sir.

Q. Did you at any time see any difficulties there, any of these nights you were there?

A. No, sir, I didn't.

Q. Did you ever see Mr. Gibbs come up there?

A. No, sir, I didn't.

Q. Were you present sometime before this occurrence in August, 1960, when Paul Callis made a statement as representative of his company to his men about these jobs there?

A. No, sir, I worked eight miles from the Coal Valley mine, where they screened the coal at the tipple.

Q. Did anybody connected with District 19 ever ask you to picket there?

751B A. No, sir.

Testimony of Harvey Brown

Cross-Examination,

By Mr. Van Derveer:

* * * * * * * *

Q. If you get cross-ways with the United Mine Workers, can they keep you from working in the fields over there?

A. If what?

Q. If you get cross-ways, if they pull your card, kick you out of the union, can the union keep you from working over there?

A. Why, no.

Q. All right. Now, where is a man going to get a job over there that does not meet with the standards of what the UMW tells him to?

A. From what I hear, there is a lot of them working over in Gray's Creek that don't belong to the United Mine Workers.

Q. But, that is what you all were doing out there on that picket line, wasn't it?

A. We was out there trying to protect our livelihood, as had been promised to the men, working there all their lives, working for Tennessee Consolidated Coal Company.

751C Q. And you kept that mine from opening for almost two years, didn't you?

A. No, I wouldn't say we kept it from opening.

Q. Well, how long did you keep the picket line?

A. Well, I'd say around eight or nine months.

Q. How long was it before the mine did actually open?

A. Well, I guess it was a couple of years.

Q. Then you all kept it from opening——

A. No, we didn't keep it from opening.

Q. Now, look, Mr. Brown. You are president of this 5881 over there, aren't you?

A. No, sir.

Q. You were?

A. I have been.

Q. And, for how long were you president?

A. I'd say around 10 or 12 years.

Q. And that local right there is the very one causing all the trouble in this particular lawsuit, and that is the reason you are here today, isn't it?

A. No, sir.

Mr. Van Derveer: Come on down. I want to ask you one question. Have you, or any member of your local, used any dynamite?

A. Not that I know of.

Witness excused.

752 **ROBBIE VANCE,**

having first been duly sworn, testifies as follows:

Direct Examination,

By Mr. Kramer:

Q. Will you give us your name, please?

A. Vance.

* * * * * * * *

Q. What occupation have you followed?

A. I've followed coal mining.

Q. Do you belong to the United Mine Workers?

A. Yes, sir.

Q. How long have you belonged to them?

A. I've belonged to them ever since 1933.

Q. What coal company or coal companies have you worked for, since 1933?

A. Tennessee Consolidated.

Q. How much of the time, during this 30 years or 29 years, since '33, have you worked for Tennessee Consolidated?

753 A. Well, I worked for Tennessee Consolidated up until March, I believe, 1960, when they cancelled the contract, and then we was out for a period of time, I don't remember exactly the date. Then they started up with Gracia and Tennessee Consolidated together.

Q. Have you been working ever since then?

A. Yes, sir, been working ever since.

Q. For the Tennessee Consolidated or whoever is running that affair?

A. That's right.

* * * * * * * *

Q. At the present time from what mine to what tipple are you hauling?

A. I'm hauling from No. 11 Gray's Creek mine to the main Tennessee Consolidated tipple up at Palmer.

* * * * * * * *

754 Q. When did you first learn of anything about the mine over there going to open, down in Gray's Creek?

A. Well, around the first of the year of 1960, Consolidated Coal Company had told us they were going to cancel the contract with the United Mine Workers and so on; but, in the meantime, they was going to open a new mine over there and see if they couldn't continue to go on. That was a month before they did cancel out. They said they was going to open the mines and see if they couldn't go on over in Gray's Creek and that they was going to give all of us employment in the Gray's Creek territory when they opened it out.

Q. Who made that statement to you?

A. Well, Mr. Callis and the company officials.

Q. To you and the other people employed there?

A. All that was there. I was there present at the time when the discussion took place.

Q. They were going to give you employment and a new job when it opened?

A. Yes, sir.

Q. Now, did you learn sometime in August, 1960, that there was a rumor that somebody else was going to open that mine?

755 A. Yes, sir.

Q. Do you recall when and where you were when you learned that rumor?

A. Well, somebody told me around my home on the 15th, I didn't know anything about it until the day of the 15th, that they was somebody on the outside that was going to go in. I didn't learn exactly who was going to go in and start the mines up.

Q. The 15th was on Monday?

A. That's on Monday, yes, sir.

Q. Did you know anything about a meeting of the locals on Sunday afternoon, the 14th?

A. No, sir, I wasn't in the meeting on the 14th.

Q. You didn't get any word about it at all?

A. No, sir.

Q. Now, on the 15th, sometime in the day of the 15th, you learned that something was being done about the opening of the mines?

A. Yes, sir.

Q. Did you go over there on the 15th?

A. No, sir, I didn't go on the 15th.

Q. So, you know nothing about what happened on the 15th?

A. No, sir.

Q. On the 16th, did you go over?

A. Yes, sir, I went on the morning of the 16th.

756 Q. Who went with you?

A. No one.

Q. How did you go over?

A. I drove a pick-up truck.

Q. Now, tell us what you saw or heard after you got over there on the morning of the 16th?

A. Well, on the morning of the 16th I had started over to where the other boys was going to meet at, several had thought we was going to meet out at the top of the mountain, so I started over to where they was going to meet at, where the road goes off into Gray's Creek. When I got there, just as I drove up to the road that turns into Gray's Creek, I saw a pick-up drive off from there, and the pick-up went on into the Pocket.

Q. Did you recognize whose pick-up truck that was?

A. Well, I thought it was Mr. Gibbs' pick-up truck, Paul Gibbs.

Q. Did you see Mr. Gibbs?

A. I didn't see him, I didn't recognize anybody that was in it because it went on before I got to the road. But, I stopped there, and hadn't been there but a very few minutes when they was several cars, four or five cars come up. To my judgment there was around 12 or 15 men.

Q. Came in these four or five cars?

A. Yes, sir. They asked me if I saw Paul Gibbs.

757 Q. Now, who asked you that?

A. Some of the men.

Q. Some of the men who came up in these four or five cars?

A. I didn't know any of them, but they asked me if I saw him, and I said no, if that wasn't his pick-up truck that drove off from here I've not seen him. So, they said they was going to wait on him. They stopped, and I was standing there talking to them, and it wasn't a few minutes 'til there were several men, then, that worked for Tennessee Consolidated that had come up from down where they was going to start the mines. They had been down there.

Q. Do you know how many of them came up from——

A. No, sir, I couldn't tell you how many, but there was a great big crowd around there in a little while. There was fellows around there from everywhere nearly. Some of them probably miners and some from one section and some from another, and everything. But, they come up there and they begin discussing the proposition, and said we've been promised this work——

Q. Now, who was making that sort of statement?

A. Well, the men that was working at the Coal Valley mine, making that statement. The other fellows that had come up to work for Mr. Gibbs, some fellow said we understood there was nobody going to work that
758 mine, wasn't going to work it at all. We told them that we hadn't, that we was entitled to it. We had been promised that by the company. Then they took right off, they didn't stay. We was around there and Mr. Gibbs come back then.

Q. Were there any threats made against these people that came in those cars?

A. I never heard no threats.

Q. Did you see any guns drawn on anybody?

A. No, sir.

Q. Were they ordered to leave there, get out of there?

A. No, sir, they wasn't ordered to leave, they just said they understood that the mines was open for anybody and that they was going to go down there and work, and when they found out that the work had been promised to the men that was there, they willingly went on off.

Q. They turned and left, then?

A. Yes.

Q. Mr. Gibbs came back after they had gone?

A. Yes, sir.

Q. All right, tell us what you saw then?

A. Well, Mr. Gibbs drove up there, stopped his truck

and got out, and there was a general discussion, pretty well the same to him as it was to the other fellows, they told him that the work had been promised to the men with the Consolidated Coal Company, the company had
759 promised us the work and we felt like we was entitled to it. After that, why, he said he thought the work had been abolished and quit and nobody had no part to it.

Q. Did any group of men, one, two, or half a dozen, or six or eight of them, I believe somebody said, rush up toward Mr. Gibbs with guns or arms or anything?

A. No, sir, I never seen no guns at all, I never seen no violence.

Q. Did you hear any threats made toward Mr. Gibbs?

A. No, sir, I didn't hear no threats toward Mr. Gibbs.

Q. Do you know of any shots being fired there?

A. No, sir, I never heard none at all.

Q. What did you do then, after Mr. Gibbs had this conversation?

A. Well, somebody come up and said, the fellow was an organizer for the Southern Labor Union, I believe, said he had come over to another road over there, and we all decided to go over there, so everybody was getting in their cars to go, all going the same way. We all went over to this place.

Q. Now, was Mr. Gibbs forced to go over there with you?

A. He wasn't forced to go, that's the same way he went home, he went on the same road we went, right on home. He stopped over there with us.

Q. Did you hear anybody threaten him, that he had to go with you, or anything of that sort?

760 A. No, sir.

Q. Do you recall whether anybody rode with Mr.

Gibbs when he left there and went over to the other location?

A. Nobody that I saw.

Q. Do you recall who went with you in your car?

A. No, sir, I don't, I don't think anybody rode with me either, I was by myself in my pick-up, I don't think anybody rode with me.

Q. Now, you went over to another location, tell us where that was?

A. Over where the Coal Valley road left the main highway going into what is known as the Coal Valley mine.

Q. At the intersection of the road into the Coal Valley mine with highway what? 108?

A. 108, yes, sir.

Q. Now, when you got up to that intersection, what was there and what did you see and what happened?

A. Well, there was a fellow that called hisself Cain, I believe, an organizer for the Southern Labor Union.

Q. Did you know him prior to this time?

A. No, sir, I never saw him before in my life, and not saw him since.

Q. What was he doing there?

A. He was standing side of the car talking to a group of men when we come up.

761 Q. Do you know any of those men or did you at that time?

A. Well, probably might have known some of them. I don't recall their names right now. There was men there from everywhere almost.

Q. Quite a group of them?

A. Quite a group of them, yes, sir.

Q. All right, now. What did you hear said?

A. Well, some asked him if he had signed any men up that day to go to work at the mines, and he said he had, about 15 or 16 of them. They asked him who they were.

He wrote their names down and when he wrote their names down somebody said that "I believe you just better burn that book you've got those names wrote on, because that is Southern Labor Union men" or something like that. He just opened the trunk of his car and come dragging his stuff out and set it on fire.

Q. Were there any guns drawn on him?

A. No, sir.

Q. Any threats made against him? What would happen if he didn't do this?

A. No, sir.

Q. Do you know who talked to him, who made the statement he ought to burn the list?

A. No, sir, I don't. Somebody back in the crowd suggested that, I couldn't say who, somebody said "I
762 think you ought to burn that book."

Q. You didn't say it?

A. No, sir.

Q. What did he do after this statement was made?

A. He just opened the trunk of his car, dragged this stuff all out and piled it up and set it on fire.

Q. Who lighted the fire?

A. Sir?

Q. Who lighted the fire?

A. He did. Mr. Cain did.

Q. Did you see any guns around there then?

A. No, sir, I never seen a gun.

Q. After this was set on fire what, if anything, occurred?

A. No, sir, I didn't see anything. Stood around there and talked a while and everybody left there then, all coming the same way, coming home. I went straight on home there.

Q. Did you see anybody hit him?

A. No, sir.

Q. Did you see any licks struck by anybody, one side or the other, against anybody else?

A. No, sir.

Q. Were any shots fired there that day that you saw or heard?

A. No, sir.

763 Q. You went on home then that day?

A. Yes, sir.

Q. On the following day, on Wednesday, were you in Palmer when—Wednesday afternoon, when anything occurred at the store or the company office?

A. No, sir, I was nowhere around there.

Q. So whatever occurred on Wednesday you don't know about?

A. No, sir.

Q. On the days or the weeks and months that followed did you do any picket duty up there?

A. Yes, sir, I did.

Q. How often were you there?

A. I stayed about one day a week out there for several months. Me and one and sometimes two more fellows, taking turn about. There were three of us, sometimes just two of us.

Q. Were you there in daytime or nighttime?

A. Day.

Q. What about stopping anybody that came through there?

A. We never stopped anybody.

Q. Did you interfere with anybody going to any of the mines around there?

A. No, sir.

Q. Ever make any threats against anybody going to the mines around there?

764 A. No, sir.

Q. Ever prevent by any way, either by threats or

blocking the road, or anything of that sort, anybody from going on through there?

A. No, sir, they hauled coal from out of there, down in the Gray's Creek section where they were stripping off, hauled coal from all over there, all those mines.

Q. They'd go right on through there when they wanted to?

A. Yes, sir.

Q. What were you doing there, anyway? Why were you over there?

A. Well, we had been promised that work by the Consolidated Coal Company, down in that section, and it was the only thing in the world that we had to live at. Since we had been there all our lives and everything we felt like the work actually was ours, it was Consolidated's property, and we was just asking for a living out of it, that's all.

Q. Was there any other employment there in that immediate area except coal mining?

A. No, sir.

Q. And you had worked at it all your life?

A. All my life.

Q. Did anybody connected with District No. 19 ever ask you to do any picketing over there?

A. No, sir.

765 Q. Did you ever get any compensation or pay from anybody for doing any picketing over there?

A. Yes, sir, we got orders—not for picketing, we got an order from the District for groceries or something to help us, but it wasn't picketing. They just give us a grocery order to help us along during some of the time that we were picketing.

Q. That order, was it given to others, do you know, besides those who picketed?

A. It was given to all miners.

Q. Who were out of work?

A. That were out of work, yes, sir.

Q. Aside from that you got no other consideration at all for anything you did there?

A. No, sir.

Q. And no instructions or directions from the International or from the District?

A. No.

Cross-Examination,

By Mr. Van Derveer:

Q. Now, Mr. Vance, you are working for Grundy Mining Company today?

A. So far as I know. I don't know whom I'm working for, it has changed hands two or three times right here lately and actually I just don't know.

Q. Sir, you know that you are working in Grundy Mine No. 11?

766 A. The last check I got was Grundy Mining Company check.

Q. And you still say you don't know who you are working for?

A. That's all I know.

Q. Driving a truck?

A. Yes, sir.

Q. And you have served notice on everybody over there that if Paul Gibbs is employed by Grundy, all of you are coming out again?

A. No, sir.

Q. You wouldn't work with him today, would you? You wouldn't work with him today?

A. Why, sure, if he was to go to work I'd have no other choice.

Q. Now, Mr. Vance, you are the man that hit Johnny Cain the first time in the back of the head?

A. No, sir.

Q. Are you denying that?

A. Yes, sir, I'm denying it. I did not hit Johnny Cain.

Q. Are you also denying here that over there at the Coal Valley entrance off # 108, or the entrance to Gray's Creek off the Pocket Road, that you didn't see one single shotgun or rifle?

A. No, sir, I never saw not one.

Q. Are you denying here that these two or three
767 cars that came up, that you said turned around and left, were not hurried on their way by a shotgun blast in the back of the car?

A. No, sir, it was not.

Q. Do you deny that the dent itself was there and you saw it?

A. No, sir, I didn't see it.

Q. Are you denying that this mob that was there at the entrance to the Gray's Creek Road, and there was about 100, wasn't there?

A. To my judgment, around 50 or 60.

* * * * * * *

Q. Did you not see Estell Woodley put a shotgun through there and tell Mr. Gibbs that he was going to kill him?

A. No, sir, I didn't see that.

Q. Did you see Mr. Gibbs get out of his truck?

A. Yes, sir.

Q. But you say that he was not told to get out?

A. No, sir. He drove up there and got out and talked.

Q. Did you not see a number of cars get ahead of Mr. Gibbs' truck, with Mr. Gibbs in the middle, and a number

of you get behind him, and in that fashion go over to the intersection of——

768 A. I don't know where his truck was at in the group that went over there, but I know he wasn't forced to go, it was on his way home and he went along with the balance of the cars that was there. As to where he was at, I don't know.

Q. How many cars were ahead of him?

A. I don't know.

Q. How many was behind him?

A. I couldn't say that.

Q. Where were you?

A. I couldn't tell you, I was in the group that went over, but I don't know if I was closer to the front——

Q. Ahead or back of him?

A. I don't know, I just know that I went. There was cars in front of me and cars behind me, but I just don't know.

Q. At least you will say that all of you in that fashion went over to the intersection?

A. We all went over there but we didn't take him, he went in the group that went.

Q. And is it your testimony, Mr. Vance, when you met Mr. Johnny Cain, he said, "I'll be happy to get everything I have and burn it up," and there was no urging on your part?

A. No, sir, I wasn't the man that spoke to Johnny Cain.

Q. All right, who is the man?

A. I don't know.

Q. You were there?

769 A. I was there, there were different men talking, and everybody was moving around, talking.

Q. Several men hit Johnny Cain?

A. No, sir, I never seen nobody hit Johnny Cain.

Q. All right. It is your testimony that he was not struck?

A. I don't think so, no, sir.

* * * * * * *

786 **JOHN R. CONRY,**

having first been duly sworn, testifies as follows:

Direct Examination,

By Mr. Kramer:

Q. Your name is Conrad?

A. Conry, C-o-n-r-y.

Q. Conry, all right. What is your full name?

A. John R.

Q. John R. Conry. How old are you, Mr. Conry?

A. 58.

Q. And, where do you live?

A. Tracy City.

Q. Have you lived in Tracy City for many years?

A. Practically all my life.

787 Q. What occupation do you follow?

A. Coal mining.

Q. How long have you been a coal miner?

A. Well, about 25 years, I guess, something like that.

Q. Are you working now as a coal miner?

A. Yes.

Q. Where are you working now?

A. Over in what they call the Pocket.

Q. Over in the Pocket. What mine?

A. Well, it's Graham's Coal Company.

Q. Now, Mr. Conry, in 1960, in August, when there was some question about Gray's Creek mine and so on, over in that territory, were you employed in there?

A. Yes, sir.

Q. Where were you employed at the time?

A. I was employed by Paul Gibbs.

Q. Were you a member of the United Mine Workers?

A. Yes, sir.

Q. What mine were you working at for Mr. Gibbs in August, 1960?

A. # 59.

Q. The mine that we know as # 59. What kind of a mine was that?

A. Just a truck mine.

Q. Truck mine, hand loading?

788 A. Yes, sir.

Q. What job did you have?

A. I loaded coal.

Q. When did you first learn that there was any question about this new mine that they were talking about opening, over in Gray's Creek?

A. I didn't know anything about it until we started by and there was a picket line.

Q. You started to go to work, did you? Was that on a Monday morning?

A. I guess it was, I don't remember exactly.

Q. You don't remember the date. Was it the first day that there were any pickets up there?

A. The first time I knew there were any pickets.

Q. And, you went the same route every day, didn't you?

A. Yes, sir.

Q. Now, on this first day that there was a picket line up there, what did you do?

A. Well, I stopped and, of course, wanted to know, and they told us to go on and go to work.

Q. Did you go on down to work at this mine that day?

A. Yes, sir.

Q. That was for Mr. Gibbs. What about the next day?

A. Well, the same thing.

Q. What about the following day? Did your whole
789 crew come through that way?

A. Yes, sir.

Q. Now, how near would you go to the picket line or where the pickets were, day after day, as you went through?

A. We passed right down on the highway, on the road.

Q. Passed right down by where the pickets were. Working for Mr. Gibbs?

A. Yes, sir, I was working for Mr. Gibbs.

Q. Were you ever in any way interred with?

A. No, sir.

Q. Nobody made any threats or stopped you at all. How long did you continue to go by there, day in and day out, as you went to your work?

A. Well, on until we got through work.

Q. When you got through working, I don't know what that mean. What do you mean by "got through work?"

A. Well, we worked the mines out.

Q. You worked the mine completely out?

A. Yes, sir.

Q. So that there was no more coal to mine. You continued to work there day in and day out, with the pickets at the top of the hill. How many men were working in this mine during this period of time there?

A. There was seven or eight, I guess, something like that, I don't remember the exact number.

* * * * * * *

790 Mr. Kramer: That's all.

Testimony of John R. Conry

Cross-Examination,

By Mr. Van Derveer:

* * * * * * * *

Q. Now, Mr. Conry, were you there either in your mine or the other one when a fire broke out about a week or so after the 15th or 16th of August?

A. The motorman came back and said there was a sack burned in the mouth of the mine.

Q. Yes, sir. Now, what is the effect, if you men are in a mine like that, and a sack is set afire, and it
791 gets full of smoke, what does it do?

A. Well, you would probably smother if you stayed there long enough.

Q. All right. You have to get out, in other words?

A. Yes.

Q. Now, how long had you been working for Mr. Gibbs?

A. I believe long about '56.

Q. Now, when this sack was set afire there, that was about a week or 10 days after the 15th and 16th of August, 1960, wasn't it?

A. I don't remember exactly but I guess somewhere along there.

Q. Now, that's the first time since you had ever been working for Mr. Gibbs that ever such a thing happened?

A. That's right.

Q. Now, in addition to that, for Mr. Gibbs to get to work, not you, he had to go down the Pocket Road and pass the picket line on the right, didn't he?

A. Yes, sir.

Q. Now, before this trouble on the 15th and 16th of August, Mr. Gibbs was there every day or so, wasn't he?

A. Well, as far as I know. Of course I was inside the mine.

Q. But, after the 15th and 16th of August, you never saw him there but on one time, did you?

792 A. Well, I couldn't say just how many times.

Q. It was very few, wasn't it?

A. Yes, sir.

* * * * * * *

Q. Who did he turn it over to?

A. I didn't know in particular that he turned it over to anybody.

Q. But you didn't see Mr. Gibbs there like you did before?

A. No, not inside the mine.

Mr. Van Derveer: I believe that's all.

Redirect Examination,

By Mr. Van Derveer:

Q. Mr. Conry, do you know how that sack caught on fire there?

A. I don't know a thing about it, no, sir, just what the motorman told me.

Q. Did you go out of the mine or did you stay on in there? Didn't suffocate you people, you stayed right on and worked, didn't you?

A. Well, he said he carried it back outside——

Q. And all you know——

793 Mr. Van Derveer: Just a minute. Your Honor we believe the witness should be allowed to answer.

Q. I beg your pardon, if you are not through, complete the answer?

A. I had no more to say.

Q. You saw no fire in the sack?

A. I never did, no, sir.

Q. Didn't smell any fumes?

A. No, sir.

Q. All you knew the motorman came in and said there was a sack burning out there, that's all you knew about it?

Mr. Van Derveer: But, Mr. Conry, that same day a fan belt was cut, cutting off the exhaust fan, wasn't it?

A. At one time, I don't remember whether that was the same day. But, there was a fan belt cut, several times.

Mr. Van Derveer: Which cut off the exhaust fan and cut off the air, didn't it?

A. That's right.

Mr. Van Derveer: Now, all of that, too, happened after that trouble on the 15th and 16th?

A. I couldn't say what dates.

Mr. Van Derveer: But, it was some time after that. I believe that's all.

By Mr. Kramer:

794 Q. You have already testified you were a member of the union?

A. That's right.

Q. All the other men in there were union members?

A. Yes, sir.

Q. Nobody ever asked you to stop work there, when you came there they told you to go right on. Was there a lot of other things, if somebody wanted to damage that mine, could have been damaged easily, rather than just a fan belt that got cut or broken?

A. Surely.

Q. Many of them, weren't they, more expensive than that?

A. Yes.

Mr. Van Derveer: But, the fact is, some of them in that area had been damaged, hadn't they?

A. I don't know.

Mr. Kramer: That's all.

Witness excused.

WALTER SCHRUM,

having first been duly sworn, testifies as follows:

Direct Examination,

By Mr. Rayson:

Q. Will you state your name, please?

A. Walter Schrum.

Q. And, where do you live, Mr. Schrum?

795 A. Tracy City.

Q. And, how old are you?

A. If I live until the 18th of this month, 59.

Q. 59?

A. Yeah.

Q. Are you a member of the United Mine Workers?

A. Yes, sir.

Q. Are you a member of local union 5881?

A. Yes, sir.

Q. Do you hold office in that local union?

A. Yes, sir.

Q. What office do you hold?

A. Chairman.

Q. The president?

A. Yeah.

Q. How long have you held that office?

A. Ever since '59, June.

Q. How do you become president or chairman of the local union?

A. Well, of course, we have an election, just like anything else, and the men chose whoever they want to serve as their chairman.

Q. Is this a salaried job?

A. No, sir.

Q. Do you receive pay for that job?

796 A. No, sir, it's on a voluntary basis.

Q. Are you—what business do you follow?

A. I've been working in the coal mines up until June 8th, when the mine shut down.

Q. Of this year? You worked up there until June 8th of this year?

A. June 8th of this year.

Q. How long did you work for Tennessee Consolidated Coal Company?

A. Well, I first started for Tennessee Consolidated Coal Company in 1923, and I worked off and on up until '27, and then I worked from '27 on to June 8th. Except one little space when they shut down what we called the old mines before they moved to Coal Valley. I was off for just three or four months while I was waiting on my turn to come to Coal Valley.

* * * * * * * *

797 Q. Do you know Paul Gibbs?

A. Yes, sir.

Q. Have you known him long?

A. Yes, sir.

Q. How long have you known him?

A. Oh, I'd say 35 years.

Q. I believe that you and he were brothers-in-law at one time, is that correct?

A. Yes, sir.

Q. Do you have children who are nephews and nieces of Mr. Gibbs?

A. Yeah, I have two boys and one girl by his sister.

Q. Mr. Schrum, I'll ask you if you recall the incident at the Gray's Creek mine entrance in August of 1960, when Mr. Gibbs and some other men went there evidently to open a mine at Gray's Creek. Do you recall the time?

A. Yes, sir.

Q. When did you first hear that these men were going to go there or that there might be a mine opened at Gray's

Creek on the 15th of August? When did you first hear that?

A. I wouldn't be positive about that, but I think it was on Saturday before that was to start on Monday.

Q. How did you come to hear it?

A. Well, I couldn't say positive about that, but it
798 was just rumored. Of course I couldn't say, I don't remember just who told me but I was told. Maybe it was several.

Q. Was there a meeting of the local union after you heard this rumor?

A. Yes, sir.

Q. When was that meeting held?

A. That was on Sunday before this occurred on Monday.

Q. What time on Sunday was it held?

A. The meeting was called at two o'clock, I believe.

Q. Did you call the meeting?

A. Yes, sir.

Q. Did—this was a meeting of the Coal Valley miners?

A. Yes, sir.

Q. 5881, local union. Was the matter of the Gray's Creek mine and the possibility of a mine being opened there discussed at this meeting?

A. Yes, sir.

Q. Was any action agreed upon at that meeting?

A. No, sir.

Q. Was Mr. Gilbert present at that meeting?

A. No, sir.

Q. Had you been able to get in touch or had you tried to get in touch with Mr. Gilbert?

A. I had tried to get in touch with him.

Q. All right, sir. Do you know whether any of the
799 men who attended that meeting said that they would go to Gray's Creek the next day?

A. No, sir, I didn't hear anyone say that they would go to Gray's Creek the next day.

Q. Did you go to Gray's Creek on Monday, August 15th?

A. No, sir.

Q. Did you know that anyone did go there, any members of local union 5881?

A. Well, I could only tell what I heard about that.

Q. Were you told by some of the members of that local union that they had gone down there and seen Mr. Gilbert there?

A. Yes, sir, four men, five maybe.

Q. All right, sir. Did you go to the entrance to the roadway leading to this mine site on the 16th?

A. Yes, sir.

Q. What time of day did you get there?

A. Oh, I'd say around six o'clock, maybe a little earlier, maybe a little later.

Q. Were there many there when you arrived there?

A. I don't—I couldn't state how many, maybe there was 12 or 14.

Q. Was Mr. Gibbs there?

A. No, sir.

Q. Did he come later?

A. Not down to the mine site.

800 Q. Did you see Mr. Gibbs in that vicinity that day?

A. Yes, sir.

Q. Where did you first see him?

A. I saw him back up there at what they call Dogwood Flats, where the road leads to the Pocket.

Q. Did you talk to him?

A. I don't think I said a word to him there.

Q. Was he molested in any way?

A. Not that I know of.

Q. Did any one pull him out of a truck or pull a gun on him?

A. If they did, it was before I got there.

Q. Do I understand you correctly that when you came up to the Dogwood Flats, Mr. Gibbs was already there, is that correct?

A. Yes, sir.

Q. What was he doing——

A. He was just standing there beside his pick-up truck when I come up.

Q. Did you see him talking to any one?

A. I don't think that there was any conversation going on between him and anyone. Just a bunch of men standing around there, talking. I don't know even what the discussion was.

Q. You say you did not talk to Mr. Gibbs on that
801 occasion?

A. Not at that point.

Q. Did you see Mr. Gibbs at any other place that morning?

A. Yes, sir.

Q. Where was that?

A. I'd say that was five miles from this place, back towards Palmer, I'd say north of this place, right on the side of the main highway, 108 highway, I'd say maybe 25 feet off the main highway. Just guessing.

Q. How did you get there?

A. Well, I believe there was four or five of us went in a station wagon or carryall, whatever you might call it, over there together, and we came back together, headed for home.

Q. Do you know whether Mr. Gibbs went over there?

A. Yes, sir, I reckon he went from this other place over there.

Q. Was he forced to go over there?

A. Sofar as I know, I think I made a statement before the trial examiner that we took him over there, but per-

sonally I have studied over that thing, I don't think that I opened my mouth to him.

Q. Do you know that he was taken over there?

A. I did not see nobody, that was just rumored, that he had been took over there by our crowd, and that is what I testified to.

802 Q. Did he go over there—how did he go over there, do you know?

A. Well, I suppose he went in his truck, I couldn't recall that I seen him getting in his truck or out, but when I went on over to this other place, the best I remember he was already at that place.

Q. All right, sir. What did you see when you got there?

A. I saw a pretty good little crowd of men there.

Q. Was there anyone there other than members of 5881 and Mr. Gibbs?

A. Well, there could have been. Of course the most of them were our members.

Q. Was Johnny Cain there?

A. Well, they told me that was Johnny Cain, that's all I know.

Q. Did you know him at that time?

A. Never saw him before in my life or since.

Q. All right. Now, did you talk to Paul Gibbs at that place?

A. I think I said this to him, I said Paul, you know this was a meat and bread proposition to us, and that is every word that I said.

Q. You say this occurred at this point some several miles away from the Dogwood——

A. Yeah, I was just guessing it was five miles from
803 this road to the other that led down to the old Coal Valley mines, right on the side of the highway.

Q. How long were you at this other place, Mr. Schrum?

A. The first place?

Q. The second place, where you made this remark?

A. I couldn't say about that, I estimate it 20 minutes.

Q. All right. Now, was Mr. Gibbs molested in any way while you were there?

A. No, sir.

Q. Was this Cain molested in any way?

A. No, sir.

Q. Were there many men there?

A. There were several men there.

Q. Why did you go over to the Dogwood Flats that morning, Mr. Schrum?

A. Well, why did I go to Dogwood Flats?

Q. Yes, sir.

A. We went down into the mine site that morning, that was from the Dogwood Flats, a mile and a quarter. We had heard that they was going to start mines in there, of course, and we had been promised that work, and it had been the practice, ever since I had worked for Tennessee Consolidated Coal Company, when one mine shut down that they took the same men to the next mines. Paul Callis had made a statement in our bath house that that would be our next big mines, is the way
804 he put it. He said we put this strip outfit in here to try to hold our contract with the TVA until we can get this mine open. Said the old mines will soon be worked out. The haulage is getting so far away that we can't bear the expense, and sooner or later it will be shut down, and we want to have this mine over in Gray's Creek ready so every time a crew or section works out, in the Coal Valley mines, we will move them from there to Gray's Creek. And that will be your next job.

Q. Is that why you were over there?

A. That is why we was there.

Q. Did George Gilbert or anybody with the district or

anybody with the International Union tell you to go over there?

A. No, sir.

Q. Suggest you to go over there?

A. No, sir. In fact I don't think they even knowed about it, until maybe a day or two afterwards.

Q. Did you talk to George Gilbert about that letter?

A. I'd say it was seven or eight days before I saw George Gilbert. Just guessing.

Q. Whenever it was that you did talk to him, did he give you any advice or any instructions?

A. Well, he said this to us. He said, now, boys, now that you have got a picket line here, the law allows you three men and be sure you don't have over three men, don't have no violence, don't have no arms out here, do nothing that you shouldn't do.

Q. Had you seen any guns out there before that?

A. How's that?

Q. Had you seen any guns that any of your members had?

A. No, sir.

Q. Did you?

A. I hadn't.

Q. Did you go out there and picket after that, on occasions?

A. Did I go out there on occasions?

Q. Yes, sir.

A. Yes, sir.

Q. Did other members of your local union?

A. Yes, sir.

Q. Who would arrange for the times when different fellows would go?

A. Well, of course, we met and decided that we would have three men of a night and three of a day. So, we set that that way and every man took his turn.

Q. You did too?

A. Seven days a week.

Q. Did you, at anytime, receive any grocery orders or something of that character from District 19?

A. We had groceries give to us, I'd say practically every merchant in Grundy County.

806 Q. While you were on the picket line?

A. While he was on the picket line.

Q. In addition to those did any of the members of 5881 receive grocery orders from District 19?

A. From District 19?

Q. Yes, sir.

A. Yes, sir.

Q. Do you recall when they started?

A. I'd say about the last of November, the first of September. That same year.

Q. How long did that picket line last?

A. It lasted from August 15th, or they said there was some men there the 15th, or from the 16th, until Allen & Garcia signed the contract May 5th.

Q. Did you return to work sometime the following year?

A. I returned the last day of May, 1961, under the Allen & Garcia—they was hired as operators for Tennessee Consolidated.

Q. Did you continue to work until the Coal Valley mine shut down this year?

A. Yes, sir, I worked the last night the mines was worked.

* * * * * * * *

807 Q. Do you live close to Mr. Gibbs?

A. Yes, sir.

Q. How close?

A. Oh, I'd say a quarter of a mile.

Mr. Rayson: I think that's all. Just a moment. Tracy City, do many or few coal miners live in that town?

A. There is a good many that lives there.

Q. Many members of the United Mine Workers live there?

A. Yes, sir.

Q. Mr. Gibbs maintained his residence there a number of years?

A. Yes, sir, all of his life.

Q. He does now?

A. He's had a home there all of his life.

Q. And does now?

A. Yes.

Mr. Rayson: That's all.

Cross-Examination,

By Mr. Ables:

Q. Mr. Schrum, I believe you stated that you got the word on this opening down at Gray's Creek on Saturday?

A. I said I think it was Saturday. I believe I stated that I wasn't positive about it, but I'm pretty sure
808 it was on Saturday before the occasion on Monday.

Q. You don't have any idea who put that word out, do you?

A. Who put it out?

Q. Yes, sir. Who told you?

A. Well, I've heard different things about it, so I couldn't say exactly who.

Q. You don't recall who told you, off-hand?

A. Well, no, I couldn't say exactly who told me.

Q. You all had a meeting there on Sunday afternoon, I believe, is that correct?

A. Yes.

Q. Did you call that meeting, sir?

A. Yes, sir.

Q. As president of the local?

A. Yes, sir.

Q. Now, when did you advise Mr. Gilbert that you had a meeting, or do you advise him?

A. I didn't advise him at all.

Q. Now, what was his job? Was it to consult with you gentlemen and members of the locals and assist you in your problems?

A. Of course he is the district representative.

Q. Yes, sir, I believe you are under the jurisdiction of the district, are you not, so to speak?

809 A. How's that?

Q. I believe you are under District 19, is that correct?

A. Yes.

Q. You didn't advise him that you were having some problems to start off with?

A. I think the first time I saw him we discussed that, of course, yeah. But, I didn't call him or ask him anything about what to do about it.

Q. And, this meeting, how many were present there on Sunday afternoon, do you recall off hand?

A. Oh, there was a pretty good crowd there, I'd say there was 60 or 75 members.

Q. Now, you all didn't take any formal action, is that what you stated?

A. That's right.

Q. Nothing formal, you just adjourned——

A. Just adjourned and left it as it was.

Q. You didn't appoint a picket committee at that time?

A. No, sir.

Q. Who at that time was vice-president?

A. James Poss.

* * * * * * *

Q. All right, sir. Now, you say you didn't go down there on the morning of the 15th, is that correct?

A. That's right.

Q. And you went down the morning of the 16th?

A. That's right.

Q. And, when you arrived, how far were you from Mr. Gibbs' truck when you got in the area?

A. You mean when I went down to the mine site?

Q. Yes, sir.

A. Gibbs wasn't down in there, if he was I didn't see him.

Q. Now, you went in, I believe, through the Pocket Road, is that the way?

A. No, you went right down Dogwood Flats and went——

Q. Down the Coal Valley Road?

A. Yeah.

Q. Now, where did you see Mr. Gibbs the first time?

A. I saw him up at this Pocket Road that leads back to the main highway out of the Pocket, right in the section of Gray's Creek Road, of what they tell me is called Dogwood Flats.

* * * * * * * *

Q. Yes, sir. Now, when you saw him, what was he doing?

A. When I came up there he was standing aside of his truck.

Q. How many men were there?

A. Oh, I don't know how many was there at that time. There was a pretty good crowd, I'd say maybe 20, 25.

Q. Was Mr. Woodley there?

A. I don't recall seeing Woodley.

Q. What about Mr. Poss, James Poss?

A. Poss wasn't there. Let me see about Woodley now, I wouldn't be positive about that. I might have saw Woodley. It has been a long time.

Q. It has been about two years, now, I believe, Mr. Schrum. You say you didn't see any guns at all?

A. No, sir.

Q. You didn't see a rifle or shotgun?

A. I didn't see any weapons.

Q. At all?

A. Whatever.

Q. You didn't see Mr. Woodley put a gun in Mr. Gibbs' face?

A. No, sir. If he done that, he done it before I came out there.

Q. Now, you didn't see any pistols at all?

A. Any what, now?

Q. Pistols?

A. No, sir.

Q. Were you carrying a pistol?

A. No, sir.

Q. Do you carry pistols?

813 A. No, sir.

Q. Do you carry a rifle?

A. No, not only when I go hunting.

Q. Now, you got word then, I believe, that Mr. Cain was over there somewhere else. Where was Mr. Cain?

A. What they said was Mr. Cain, the man they said was Mr. Cain was over at this other place, that I spoke about.

Q. Coming through Coal Valley way?

A. I don't know whether I heard that Cain was over there for sure before I went over there or not, I may have. I may have testified to that, I don't remember for sure.

Q. Then I believe you all got in the cars and went over to join Mr. Cain, is that right, or join the others?

A. We went right on our way to home. It was right

on our road, the only way we could go without coming back through Whitwell and up the mountain.

Q. Where was Mr. Gibbs' truck during this trip over there?

A. I don't remember whether I saw his truck after I got over there. Of course, I saw him, I was as close from here to you, I guess, to him, after I got over there. But I don't recall seeing his truck at that point.

Q. Now, when you all left out of the pocket road, over there, and went to the other area, did he get in his own truck and drive?

814 A. I couldn't be positive about that, I don't remember seeing him get in his truck.

Q. Now, did you all stop at another place?

A. Stop at another place?

Q. Yes, sir, when you got over to where Mr. Cain was?

A. That's where they said he was, that is where we stopped.

Q. Was he there, was there a fire there, when you got there?

A. I didn't see no fire.

Q. What was Mr. Cain doing when you arrived, Mr. Schrum?

A. I believe he was sitting there in the car when I arrived, if that was him.

Q. Did you hear somebody suggest that he burn his briefcase?

A. No, sir.

Q. Did you see him get his briefcase out of his car and burn it?

A. No, sir.

Q. Sir?

A. No, sir.

Q. Did you see a fire there?

A. No, sir.

Q. You didn't see any smoke?

A. No, sir.

815 Q. Didn't see anybody strike him?

A. No, sir.

Q. Not at all. I believe there was a briefcase burned there that day, were you there when that was done?

A. There could have been one burned, I didn't say there wasn't, there could have been.

Q. Did he give you a list of the men who were going to work——

A. No, sir, I never asked him nothing.

Q. Did he give a list to anybody else in the group?

A. Not that I know of.

Q. I understand somebody said something about a bread and meat proposition, and he said he'd just burn his briefcase, and burned it himself. Is that what he did?

A. How's that, now?

Q. Some of the men here stated that he burned his briefcase.

A. I didn't say it, I don't know what the other fellows said.

Q. You didn't see him burn his briefcase himself?

A. No.

Q. Did you see somebody else burn it?

A. No.

Q. How close were you to Mr. Cain?

A. Oh, I guess I was as close as from here to that table.

816 Q. You didn't see anybody strike him?

A. No, sir.

Q. At all?

A. No.

Q. Then, what did you all do? Did Mr. Cain leave or did you leave?

A. Everybody just began to break off and go home, and I did too.

Q. You all didn't drive down to the junction of 108 and 56?

A. We had to come that way, yeah. That's the very way we come, the only way we could without going to Whitwell.

Q. Yes, sir. Did you go through Palmer yourself?

A. Yeah.

Q. Went on to Tracy City?

A. The black-top road goes right through Palmer.

Q. And you followed it on out to the junction and cut off for Tracy City, there at that point?

A. Right on out to the junction and hit 56 and from there to Tracy City.

Q. Was Mr. Cain with you in that convoy of cars?

A. No, sir.

Q. You didn't see him again?

A. Didn't see Cain any more.

Q. Did you see him get in the car? His car?

817 A. I don't think so.

Q. Where were you, Mr. Schrum, that you missed all of this?

A. I was standing around there.

Q. You're president of that local, aren't you?

A. Yeah.

Q. Don't you have a certain amount of authority over your men?

A. No, I wouldn't say authority over them. I preside over the meetings.

Q. Don't you have a certain amount of responsibility as president?

A. Of course I carry on the business at the meetings.

Q. And that ends your responsibility there?

A. As far as my part is concerned.

Q. You never carry a gun, you say, Mr. Schrum?

A. Not outside.

Q. Do you make it a habit of carrying a gun?

A. No, sir.

Q. Do you carry a rifle?

A. No, sir.

Q. Did you ever——

A. Oh, I've carried them, yeah, I don't say I never carried a rifle.

* * * * * * *

820 **WILLIAM J. TURNBLAZER,**

having first been duly sworn, testifies as follows:

Direct Examination,

By Mr. Rayson:

Q. Would you state your name, please?

A. William J. Turnblazer.

Q. Where do you live, Mr. Turnblazer?

A. Middlesboro, Kentucky.

Q. Are you an employee of the United Mine Workers, District 19?

821 A. Yes, sir.

Q. Are you a member of the bar of the State of Tennessee?

A. I am.

Q. How long have you been employed by District 19?

A. Since February, 1947.

Q. I believe there has been testimony to the effect that you have quite recently been designated as acting president of District 19, effective December 1, 1962?

A. That's correct.

Q. Mr. Turnblazer, you, of course, have been in the court room during the testimony and I'll ask you if you recall the matter of Gray's Creek in August, 1960?

A. Yes, sir, I recall the incident.

Q. Where were you on August 15th, 1960?

A. I was in Middlesboro, Kentucky, on the 16th, as I recall I was in Knoxville on the 15th.

Q. I believe you were possibly in Mr. Kramer——

A. I was in Mr. Kramer's office.

Q. All right, sir. Were you in Middlesboro on the 16th?

A. I was.

Q. Did you on that occasion attend a meeting at which Mr. Gilbert was also present?

A. I saw Mr. Gilbert that morning. He came in the office about eight a. m. and I was in and out of the meeting that they were in. I had other work to do. I
822 was not in the meeting at all times, but I was in and out.

Q. Now, did you later learn that some sort of picket activity had occurred in or near the Gray's Creek area?

A. Yes, sir. I learned about it from the examiner of the National Labor Relations Board.

Q. Who is he?

A. Mr. Resin.

Q. Did you later go to southern Tennessee and make an investigation of the matter?

A. I did, on the 22nd and 23rd of August, 1960, and met with Mr. Resin, and he took some statements from several of the employees of the Coal Valley mine.

Q. Did you talk to several of the employees of the mine at that time?

A. I did.

Q. At whose direction did you come down here, Mr. Turnblazer?

A. I was sent down there by Mr. Ridings, the district president.

Q. Did you convey any instructions at all to the people with whom you talked?

A. I certainly did. I explained to them that the labor board was there investigating and that certainly any mass picketing would only cause them a great deal of trouble, and instructed them that they should limit the num-
823 ber of their pickets and under no circumstances have any violence or any threats of violence to any person coming into or near that area.

Q. Do you know of any other incidents of the type said to have occurred August 16th that occurred subsequent to that time? Prior to the time the Coal Valley mine reopened.

A. I never heard of any more incidents.

Q. Now, Mr. Turnblazer, there has been some testimony in the record concerning the reopening of the Coal Valley mine and would you state what company it was that reopened it and whether or not that company executed a contract with the United Mine Workers?

A. In the early part of 1961, May, or thereabouts, the Allen & Garcia people signed a contract on behalf of Tennessee Consolidated Coal Company and reopened the Coal Valley mine.

Q. All right, sir. How long did that mine continue to operate?

A. That mine continued to operate until early June of 1962, and it fell in.

Q. What did Tennessee Consolidated and Allen & Garcia do thereafter?

A. They—in the middle part of June started the removing of machinery from the abandoned Coal Valley mine, which had been recovered, and moved that to the Gray's site area and commenced opening what is known as
824 Gray's Creek No. 11. They transferred, I think the first compliment of men was 21 men from the

Coal Valley mine over to Gray's Creek and commenced operation, and that has——

(Off-record discussion with a member of the jury.)

A. ——and that has increased to approximately 40 employees at the present time.

Q. Now, did Allen & Garcia withdraw from their arrangements with Tennessee Consolidated?

A. I am advised of that, yes, sir.

Q. Prior to their withdrawal did they give notice of termination of their contract with the United Mine Workers as respects any mine?

A. Yes, sir, they gave notice of termination and that contract expired on October 24th, 1962.

Q. Now, prior to that time—when did Allen & Garcia leave?

A. That's something that we have been trying to determine and we do not have the exact date as of this time.

Q. Prior to October 24 had you had any discussions with the officials of Tennessee Consolidated with respect to the operation of that mine?

A. Yes, sir, we met with the president of the company and discussed the situation with him. He agreed that the operation would be—of Grundy Mining would be
825 considered under contract until the termination of the Allen & Garcia contract. At that time, on the 24th, we again wired and wrote a letter to the president of the company requesting that he continue to operate his mine under the terms and conditions as were in existence when Allen & Garcia operated it. We received a wire back in which he stated that he would continue the same wage rates in effect. There are negotiations pending at this time toward the consummation of the contract at that mine.

Q. In the meantime have you instructed the members of the union to continue to work there?

A. In the meantime the members have been encouraged to stay at work. I might add we've had a hard time keeping them there.

Mr. Rayson: I think that's all.

Cross-Examination,

By Mr. Van Derveer:

* * * * * * *

826 Q. Now, Mr. Turnblazer, you have been and are now a quite frequent visitor down in the coal fields
827 in the Tracy City Whitwell and Palmer area, are you not?

A. I go down there, Mr. Van Derveer, as business requires it. I'm probably down there five times a year, six times a year, seven times a year, I don't know.

Q. As the business of your district demands?

A. That's correct.

Q. Now, when this Grundy mine opened, and Mr. Paul Gibbs was trying to open it over there, there was no contractual arrangement of any kind by and between the union that employs you and the Grundy Mining Company or Mr. Gibbs, was there?

A. No, sir, no, sir.

Q. And, Mr. Gibbs, or the Grundy Mining Company, had a perfect right in these United States of America to employ whoever they saw fit to put in that mine, did they not?

A. I assume that they did, yes, sir.

Q. But, with the full force of your union, you brought everything that you, Mr. Pass, Mr. Ridings, your International and your local could bear to keep that mine closed?

A. No, sir.

Q. You did keep it closed, didn't you?

A. No, sir, we didn't keep it. The employees of the Coal

Valley Mine had been promised that employment by Tennessee Consolidated Coal Company. Grundy Mining Company, a wholly owned subsidiary, attempted to open that mine and those employees thought that they were
828 entitled to that work, and I want to say this to this jury that we have done everything in our power to keep down any violence down there, and I have made more trips to Grundy Mining Company than any coal mine in District 19 trying to do that very thing. And, certainly, with the understanding that has been signed by Tennessee Consolidated Coal Company, and by the Allen & Garcia Company, those employees have some rights and that matter is in litigation at this very minute with the National Labor Relations Board.

Q. Now, sir, what contractual right, if any, did your union have to forcefully stop this Mr. Paul Gibbs from going to work the morning of the 16th of August, 1960?

A. They had no right to forcibly, contractually or under the law, Mr. Van Derveer. Those employees had been promised that work by Mr. Gibbs' employer, Grundy, and Tennessee Consolidated, and that's why they were there. We tried to keep down the trouble, we did keep down the trouble, and the situation there remains that we think those employees are entitled to those rights, and we will assist them, but not through acts of violence or threats of violence.

Q. You will not let that mine operate today unless it is on the terms that the United Mine Workers of America dictate?

A. That mine is operating today, Mr. Van Derveer.

Q. Yes, sir.

A. And it is operating because of the fact that those
829 employees have asked for recognition and they have been assured that they are to receive the wages

that they were receiving when it was under Allen & Garcia. Now, I don't know how long they can keep working. We hope to keep them there until we can get a contract as they had worked there under the Allen & Garcia people.

Q. Now, that's the very point, until the United Mine Workers dictate the terms?

A. No, sir.

Q. There was no work at that mine, was there?

A. We stand ready to sit down and negotiate. We did it in August of 1960 with Grundy. They never at one time asked us to sit down and negotiate a contract. We now stand ready, as we did then, and we are attempting to get them together now.

Q. Now, Mr. Turnblazer, you are absolutely without power to negotiate any change of any kind, shape, form or fashion in the National Bituminous Wage Agreement of 1958, as amended, is that true?

A. That is not true, Mr. Van Derveer.

Q. Can you negotiate it or must it be approved——

A. It must be approved by the National Policy Committee. Any contract, any amendment to that contract, or any new contract.

Q. Now, what is this National Policy Committee
830 except this group in Washington?

A. It is coal miners employed in and around the coal mines that are elected by local unions with the approval——

Q. Of your International?

A. Let me finish, Mr. Van Derveer. They are elected by the local unions under the International Convention which sets up the number that each district or each area is entitled to. They are elected and they, along with the resident officers of the International Union, are the policy committee, who have the authority to enter into and nego-

tiate contracts between the International Conventions, which are held every four years.

Mr. Kramer: Now, your Honor, I think we are getting off on collateral issues, and I object——

Mr. Van Derveer: We'll change the tactics.

Q. Now, Mr. Turnblazer, you also know that over in this immediate area that we are talking about, unemployment, to say the least, has been wide spread?

Q. That's generally true, Mr. Van Derveer, not only there but throughout the entire coal mining area of the Appalachian area.

Q. But in spite of that, and in spite of the need for jobs, your union has kept your men from working?

A. That's not true.

* * * * * * *

831 **Redirect Examination,**

By Mr. Rayson:

Q. Mr. Turnblazer, I just want to ask you two questions. Mr. Van Derveer said that your union stopped these people from going to work on the 16th, I'm going to ask you if anybody in your office, the district office or the International, stopped those people from working on August 16th, 1960?

A. They certainly did not.

Q. Since then have you and your associates managed to keep the peace on that picket line for as long as it was out?

A. We have done everything that we have known to do.

Q. And as far as you know, after that on that picket line there was no more violence, is that correct?

A. As far as I know of, there hasn't.

Mr. Rayson: That's all.

Recross-Examination,

By Mr. Van Derveer:

Q. Just one further question. You have also done everything you have known to do to keep Mr. Gibbs out of work, too, haven't you?

A. No, sir.

Mr. Van Derveer: That's all.

A. We have done nothing to keep Mr. Gibbs out of work.

Witness excused.

832 Mr. Rayson: May I ask your Honor's permission to read four or five lines from a deposition?

The Court: All right.

Mr. Van Derveer: To that we have no objection.

Mr. Rayson: This is page 54 of Mr. Gibb's deposition: Ladies and gentlemen, I want to read from a deposition taken from Mr. Gibbs prior to trial by the defendant United Mine Workers, on the question of who was present at Gray's Creek on August 16th. Mr. Gibbs testified at this time in Chattanooga under oath. I'll read the questions and the answers:

"Q. Now, you say that they were United Mine Workers people. Who was there that you knew?"

"A. Walter Schrum."

"Q. Anyone else there that you knew?"

"A. Yes, sir, Bobby Banks, he's mine committeeman, Alder Brewer, mine committeeman."

"Q. Anyone else?"

"A. You mean of the union officials?"

"Q. Yes, sir, just of union people that you knew?"

"A. Oh, my goodness, man, I knew half of them."

"Q. Well, just go ahead and name what you saw there?"

"A. Doug Thomas, T. G. Partin, L. A. Meeks, Estelle Woodley, did I mention Bobby Banks?, it is hard to re-

member all. But I know them when I see them.
833 Estelle Woodley is the one that stopped me with the shotgun."

"Q. You can't remember at this moment any other particular individuals?"

"A. Well, let me think a minute. Bo. McWorth, I don't know what his given name is, Marshal Sweeten, Leo Bryant, Lyle Sweeten, a bunch of those fellows around Palmer that I know their face but I don't know their names."

"Q. Yes, sir."

"A. But, all these particularly all these I have mentioned out there close to where I live."

Mr. Rayson: That is all of that deposition that I care to read, and this is also a deposition of Mr. Gibbs, taken in Chattanooga, at which time Mr. Gibbs testified under oath as follows, page 72, this is in the second deposition. Perhaps I had better say that the first deposition from which I read related to page—related to the incident of August 16th, 1960. All right, now this is the second deposition, this was taken last week, October 30, 1962. The question is as follows:

"Q. What do you say the Mine Workers had to do with the cancellation of the lease, Mr. Gibbs?"

Mr. Rayson: This lease refers to the Pikeville Coal Company lease. I am reading at page 72, line 7. I'll start again:

"Q. What do you say the Mine Workers had to do
834 with the cancellation of the lease, Mr. Gibbs?"

"A. I don't know what the Mine Workers had to do with it, whether anything or not."

"Q. You are not accusing them of doing anything?"

"A. No, I am not accusing them of having anything to do with cancelling the Pikeville Coal Company lease."

"Q. You are simply out of a trucking contract when Pikeville was cancelled?"

"A. Automatically cancelled the contract when they stopped."

Mr. Rayson: That is all of that I care to read, your Honor.

The Court: All right. Anything further?

Mr. Kramer: No, with this the defendant rests, your Honor.

Defendant rests.

* * * * * * *

1 **ARGUMENT.**

Mr. Van Derveer: Ladies and gentlemen, I am sure that by now you are fully aware that you are sitting in judgment upon one of the historic cases of our generation. When we break up from this case, and you go to your homes, and I to mine, we will be soon forgotten. But let me assure you that what you do here will be long remembered, will be heard with force in Washington and throughout this nation, as this gentlemen, Mr. Owens, has said, by the international union.

I do not believe that I have ever participated in, and I'm confident that you haven't, in a case of greater importance to this state and this area.

The issue involved in this case is not one of unionism, or picketing. You can put a picket on your shoulder and walk in front of the courthouse if you want to and say I dislike President Kennedy or I love him. You've got a perfect right, we don't complain about that. But, we do complain of the act of the international union in the force and violence that it used, and the roving caravans with shotguns and otherwise, plus the conspiracy to which, in these few brief moments, I shall try to point out to you.

Now, the Judge, a little later, will give you his charge. Mention has been made to it earlier, these questions. I would like to go through these questions one by one, right now, and to give you our view on them and the
2 reasons for them. I will not bore you with a twice-told tale, I shall not repeat evidence, I shall seek to correlate that evidence and to bring it into focus in what we believe is a fair, a just, and a righteous verdict. The Judge will give you these, and you must answer each of them, when you get back, after your foreman has been selected, and there are three pages of them.

Now, our position, in answer to question #3, and let me read it to you now: "If your answer to question #1, A, B, and C was yes, was such activity or conduct a primary strike or a primary picketing of the Grundy Mine Company. Now, here is what the defendants pled. You see, ladies and gentlemen, this is what started, what is known in this nation, as industrial warfare, and that is what they were doing over there. Now, what they are doing is what I call legal warfare. They will do what they please, the law doesn't mean (snaps fingers) that to them. And then they will come in and hear me pay tribute to Mr. Rason and Mr. Kramer—Mr. Kramer is noted for that, one of Tennessee's outstanding lawyers, they have a perfect right to employ him and I know of no more able opponent that I have ever opposed. They can get the finest lawyers they can get, and say gentlemen, let's throw every roadblock in there we possibly we can. Every one we can. And as Mr. Kramer told you, if you finally get down to damages, if it is not too much we'll pay it off and do it again. So what. If it is too much we will appeal it and stall a few years. Now, that is the
3 way they work.

Now, this #3 here is relevant on this question. The course as set out on page 1, of that part of the Taft-

Hartley Act, you'll see this when you get back to the jury room, so for us to prevail, Mr. Gibbs to prevail, this action must be primary as to Gibbs, secondary as to Grundy Mining Company. Therefore, we think that your answer should be no.

Now, what Mr. Kramer and the Union hopes that you will do is to find that question yes. So, if you answer this interrogatory #3 yes, you decide this case in favor of the Union. Now, that is what they want. So, we honestly urge you to answer question #3, no.

Now, all others throughout, it is our position, should be answered yes. #3 no, all others yes.

Now, this feud was between Mr. Paul Gibbs and the United Mine Workers of America, as borne out by the fact that when Mr. George Gilbert says, you remember, I know people in high places, we know how to get rid of it. Think of the courage it took that man to come in here and testify. Now, that man, who testified against George Gilbert, has got to go back over there and live. Now, that took real guts, to me, for that man to get on the witness stand and testify. And here is another man, Paul Gibbs, that is just about as staunch an American as I ever ran into, and he hasn't backed up one second in face of terrible odds.

4 Now, if the dispute was between the United Mine Workers and Mr. Paul Gibbs, there was the primary dispute. Now, the reason we say it was primary is because once they got rid of Paul Gibbs, then Grundy opened, and it is open today and running today, but not with Paul Gibbs. Therefore, the primary dispute, the primary dispute, was between Mr. Gibbs and the United Mine Workers. Therefore, we are going to ask you to answer this No. 3 with a no.

Now, let me move on to the others. Now, that is the secondary boycott. This Union has committed economic

murder on that man. That man worked over there in these coal fields for these many years, and to this very day he can't work in the coal fields. The lands are owned by one of the two companies, you heard the officials of both of them. You've heard the hauling contracts, it finally got down to the point where three of his trucks were finally repossessed and he started hauling gravel and sand. That is economic murder, and let me tell you something else. If they can do it to him, they can do it to me or to you or to anybody else. Now, we don't think that in a free nation, a free nation, that any union should be permitted to by those methods commit economic murder on any person, I don't care who he is. That is the secondary boycott.

Now, the interference. Mr. Kramer, able lawyer that he is, throws up what I call a smoke screen here. It is like an octopus. You know every time you get after an octopus, he emits some black fluid and confuses everything and the octopus escapes. Well, that is what we have up here in Washington, with its tentacles right down here, and every time you hunt them up, Mr. Kramer, with due regard to the able lawyer that he is, the Mine Workers seek to shuffle out this way or shuffle out that way, and that is what they are trying to do in this very case.

Now, on this conspiracy, certainly Mr. Kramer and Mr. Rayson, the able lawyers that they are, have done a magnificent job, but ladies and gentlemen, I point an accusing finger at that Mr. Owens because it is his father who is the secretary-treasurer of the International, and this Mr. Owens is just as aware of what is taking place in this case as anyone could be after years and years of study, and here is the conspiracy. Mr. Pass testified, we want that contract all over this nation. That contract or better. I don't guess at that, there is his testimony.

There is no deviation from that contract, Mr. Turnblazer so says, unless it is proved in Washington. They impose a nationwide contract all over this nation, all over. I don't care whether it is in Canada or West Virginia or California or Tennessee. You either do business under that contract or you just don't do business. Now, what does the International do, how does it get these contracts, how does it get them. Ladies and gentlemen, you do it with shotguns, and you do it with fears that you've heard right here. And the economic duress that you have heard right here. So, what this Union has said to the coal fields over there, if this field operates, if this field operates, it is going to be operated the way the International Union says that it should be. By Mr. George Gilbert, yes, sir. Mr. Turnblazer, yes, sir. And you heard Mr. Pass. They knew exactly what was happening in these fields. Who in the world is going to believe that a man like Albert Pass, that has been in the Union movement there 30 years, doesn't know what a group of miners is going to do at that point, anymore than if I put a cookie jar out and let my little girl—she'll eat every cookie in it. And they will know just exactly what that Union is going to do, and they made use of that to get that contract.

Now, what that Union did, then, up yonder and down here—let me point out. You know, this Union, Mr. Kramer says it paid no part in it. There is an International Constitution here which shows that this Union has been collecting $4.50 a month from each one of those members, some of them as long as 30 years. I haven't seen them sending any money back to them, have you? What this International seeks to do is profit by when it gets in trouble down here, which is grossly unfair. So, what the Union did, they put the bug on, together with the local, to break-up this contract, and that is exactly

where the interference came from. And as further proof of that, you have heard the Union officers testify to
7 what they say they did, and couldn't do.

Now, let's move on to agency. You see how, now, under what stretch of right and wrong these—let's say Sunday School law we learned, the difference between we should do this and we shouldn't do that. And that Union up there in Washington maintained the staff that it does, and the dues and the charters and all of that, and then when something happens down here for which they are liable, this firm says no, we didn't have anything to do with that. Ladies and gentlemen, how do you prove conspiracy? The conspiracy is executed down here on Ninth and Market Streets. Do you think these Union officers are going to admit it? It is done under the table, it is done by meeting on street corners, it is done for a common purpose, it is done to arrive at something they want, and that is what they have done here, and that is where the agency element comes in. Now, this agency, by Mr. Swope, my boys are going to let you through. Mr. Campbell, don't worry, we've got means, and there is Mr. Campbell's testimony written up. Quote, he said he has friends in high places that could move him out of the mining business. Now, I'm asking you, because it sure did move him out of the mining business, and today he can't work, not today. George Gilbert knew them. Where is Mr. Howard Madewell? Mr. Madewell, you know, replaces Mr. Gilbert. Now, why wouldn't they put him on the witness stand. He's here, around the courtroom, a
8 subpoena issued for him. I'll tell you, they were afraid to, afraid to, for fear he would testify contrary to what the others do. You see, you can tell the truth time and time and time again, and you can tell the story of Christ, Matthew, Mark, Luke and John, but basically it is the same story. If you start telling a lie to enough

people, somebody is going to get caught. Howard Madewell was not on the witness stand. There is your reason, certainly one of your reasons.

Agency? Most assuredly they were responsible. What the purpose of the local there was carrying forth the purpose of the Union, wasn't it? Now, Mr. Kramer stands up here and in an attempted emotional plea says and made his argument to you. Let me answer it by simply pointing out to you that the men that are working there are the old valley men, that on the morning in question, 14—there has been a varied number, six, 12, 14, but there are 44 men down there working, and these men are working now at wage rates. The defendant can't agree as to whether there is a contract or not, but be that as it may, it is working.

Now, this poverty in the coal field that Mr. Kramer was talking about, the testimony in this record, and I think some of you know it from general knowledge, everybody in this courtroom is, and I'm sure should be, proud of the Tennessee Valley Authority, and the testimony in this record that some of this coal was going to be used by them. The Tennessee Valley Authority needs
9 coal. We've got coal, and we've got men who want to work and mine coal. Now, who is the bugger? The bugger is the United Mine Workers of America, for the simple reason that they are going to pass work on their terms or else. And if a few people starve in the midst, what difference does that make——

Mr. Kramer: Now, if your Honor please, that argument does not pertain to any issue in this lawsuit——

Mr. Van Derveer: I'll move on. Now, ladies and gentlemen, time runs short. Now, these first three here pertain to this event of the 15th and 16th. Was the International Union engaged in a strike with the Grundy Mining

Company. They most assuredly were. Mr. George Gilbert was there. The International Union was as much a party of that as Mr. Owens, that is an acknowledged fact. Did they induce or encourage employees of Grundy to engage in a strike or refuse to perform any services. They most certainly did, against Grundy Mining Company. They wouldn't let Grundy Mining Company operate unless they got rid of Paul Gibbs and let some other men in there. Did they threaten, coerce or restrain Grundy Mining Company. Well, these Union men testified they kept it closed two years or a year and a half, something like that. We believe that those three, on the first page, should all be answered yes.

But it will amaze you as you go down through some of these others. If your answer to these others, the A, B, and C, that is the strike, the Union participation, is yes, was an object of the defendant, the International, or its agents, to force or require Grundy to cease doing business with Paul Gibbs. Now, it most assuredly was, as evidenced by the fact that when they got rid of Paul and put somebody else in there they did go ahead and do it, didn't they? With respect to the hauling contract, it most certainly did. The Grundy Mining Company is operating today and Mr. Paul Gibbs' trucks have been repossessed and can't get it, so there again we think it should be yes, to both questions.

And then, the tricky question of the defendant, on No. 3, which we say should be no, for the reasons I have heretofore explained to you. They won't even stipulate this. If your answer to question No. 3, was Grundy Mining Company engaged in commerce or in an industry affecting commerce as these terms are defined. They are even taking the position that this court does not have any jurisdiction because there is no commerce involved. Inter-

state commerce is not affected. Is there any dispute here at all that there was a 35,000 ton Navy contract with Grundy Mining Company, and the United States Navy does not sail the waters of the State of Tennessee. That is inter-state commerce, just like the Tennessee Valley Authority does business over a number of other states. What they want you to do is to answer no, there is no commerce involved, therefore kick it out. We say that should be yes, that what we are dealing with here does affect commerce.

11 Was there a wrongful interference with the plaintiff's contract of employment with the Grundy Mining Company in violation of the common law. So they come back now and say well, maybe. Maybe the jury will decide against us. Maybe they would, but if they do, there still wasn't any interference. We say there was interference, and you have heard the testimony and can draw your own conclusions, which we say should be answered yes.

Now, they say was there any interference with his contract of employment, or was there a violation of the common law of Tennessee with regards to the damage. We say that should be yes, Paul has certainly never hauled a ton of coal for them, and I believe you heard Mr. Gravit say it is operating now, I believe, six days a week over there trying to keep up with the TVA contract.

And then the seventh, was the International a party to the conspiracy of wrongful interference. Well, we say it is, the International is the bugger of the whole outfit. They are the ones keeping it from operating. Just like Mr. Pass says, we want that contract or better.

Now, further here, when you get down to damage, I would like to comment on it in this way. They say what damage did the plaintiff sustain by reason of the loss of the superintendency and the punitive damages. The Taft-

Hartley Act, that part of this lawsuit dealing with
12 the secondary boycott is based upon the Taft-Hartley
Act, which does not call for punitive damage. The interference, under the law of the State of Tennessee, does call for punitive damages. So, if you find against them, what they want you do——

(Objection.)

The Court: The Court will instruct you with respect to the laws. The attorneys may comment upon it but finally it will be the instruction of the Court for the law to be applied in this case.

Mr. Van Derveer: Now, you don't conspire without an intent to injure. We might have an automobile wreck or stumble over a stump or stub your toe or something accidently, but you don't accidently conspire to destroy something. Now, what this International Union has done, using these locals, has conspired to destroy that man, to bludgeon him, the same thing as taking a baseball bat and say we defy you Paul Gibbs, to prove this case. We'll beat you to a bloody pulp before you are through. If we can't do it with shotguns, we'll use every legal means to do it, and we'll either bludgeon you out of this case or we'll starve you out, one of the two. Now, that is malicious, that's malicious, and you know we ask for $100,000 in punitive damages. Ladies and gentlemen, we don't ask for $99,999.99, we want $100,000, and I'll tell you why. That is all we sued for, to start with, but in addition even if you
awarded $100,000 they would chuckle in their sleeves
13 and walk out of this courtroom and laugh. They
will pay off the $100,000 and say oh, well, so what. We've got mixed up, it cost us this much, now let's go back and do the same thing again. I give you my word that that is exactly what this Union is counting on. It's the same thing as a fellow that has been caught nine times driving while drunk, and everytime he has been brought

up they have fined him $1.00. As soon as he got out of the courtroom he would go get him another drink, and that is just exactly what this union is counting on here.

On the compensatory part of it, now, to compensate Mr. Gibbs, he had two things. His employment contract, $7200 a year. Now, at that time no one knew how much coal was down there, did they. They do now, and they know it is running full blast, certainly six days a week, and if production goes according to schedule there is a ready market for that coal. Now, it is up to your fair judgment, but I say 10 years at $7,200 is $72,000. Now, what would Mr. Gibbs have lost on his hauling contract. You have heard the proof of the 14,000 tons, $14,000, roughly, on the 35,000 tons. Now, beyond that, ladies and gentlemen, it is up to your fair judgment. We can only say that the mines are today operating, and operating successfully, and the coal is needed and the coal needs hauling. We also point out to you that by reason of what this union did, and the way and their manner was such that Mr. Gibbs certainly lost, I believe his expression was repos-
14 sessed, three trucks, which one accountant testified, I believe, cost $19,000 apiece, and I believe the other testified cost $16,000, or something like that.

Now, we believe that all of those elements taken together fully, completely and adequately sustain a compensatory award of $250,000. Now, that sounds like a lot of money, but let me point out to you, look who you are dealing with, too. Don't overlook it. The International Union of the Mine Workers of America. And if you make such an award as I think Mr. Kramer and Mr. Rason expect and have so stated in their closing arguments, when both of them said if I be wrong, and you do make an award, please be light on us. Certainly, they want you to be light on them, so they can pay it back and go over there and blow up another mine, or conduct similar activities. Now, we

think that punitive damages should be effective, should hurt, and we think that a man should be adequately compensated for his compensatory damages, and I point to them and say that if they dislike it, and they want to take it to the court of appeals in Cincinnati, let it go. We practice up there, too. And if they want to take it to the United States Supreme Court, let them take it, we practice up there, too. And I pledge to you, ladies and gentlemen, that whatever award you make, the good Lord willing and life staying in my body, I'll stay with the case to the very end.

Now, in closing, let me say this one point. Number 3 should be no, all others should be yes. And then such an award as you deem fair and just and reasonable. Now, by your verdict you are going to put the stamp of approval on what this Union—yes, these locals—yes, what these locals did with the International's approval. You are going to say it is all right, and you have the approval, for armed mobs pulling people out of automobiles, shooting in the rear end of a car, conducting beatings, and putting economic pressure, the terrific power of the International Union, against one lone American, Mr. Gibbs. That will be your verdict if you turn this Union loose. Now, believe me—think, ladies and gentlemen, think what the effect of such a verdict would be. I submit to you it would simply be terrible.

Second, if you find this Union guilty, and say to them, as Americans themselves, in every crisis in American history where staunchness and courageness is needed, then you shall not do, this will not pass, this is wrong, and you can speak through the mouth of your verdict. It will be a warning to them. And I submit we will have peace in our midst. This is my home, this is yours. We are proud of it, and we want to keep it on that basis, and your children and mine, I want to raise them and teach

them the dignity of the law, that there is a limit in this great nation of ours for every wrong, but when I say to my little boy and my little girl, son, this you can't do, you can't take the law into your own hands. Otherwise, we are like Hungary, for that is what happens in Russia, abroad. That does not happen—and ladies and gentlemen, I beg of you and I plead of you, let's don't here in our own community approve such as that. And let's say, with every force at our command and as loudly as we know how, in your combined twelveness, this we will not approve. Thank you.

836 **CHARGE.**

The Court: It is always more interesting, it is more interesting to the Court and I'm sure more interesting to the jury, the statement of the law involved in a case. But, nevertheless, the matter of having the law properly presented to you is an absolute essential part of a lawsuit, just as essential as having a proper understanding of the facts and the testimony in the case.

Now, since the discussion of the law is not as interesting a matter as the argument of counsel about the facts in the case, I must therefore request that you give me your careful attention, even though at times you may feel that I am talking about matters that are rather difficult and maybe not very interesting.

In order to permit you, to help you better understand the charge that I want to give you at this time, let me just briefly outline some of the things that I want to talk to you about, and the order in which I want to talk to you about them.

In the first place, I want to state to you the respective contentions of the parties, or summarize the contentions of the parties. After I have done that, I want to talk to you about some general rules of law that you would

apply in arriving at a verdict in this case, general rules that you would apply to this case as you would in a decision of any case. Then I want to become more
837 specific and I want to talk with you about the labor-management relations act, and about the alleged violation of this act. In other words, the so-called secondary boycott phase of the lawsuit. In that respect I will want to outline to you and discuss with you the activities that may violate the act. I will want to discuss with you the significance of the object of these activities in constituting a violation. Then I will want to discuss with you the matter of commerce and what is meant by that. And finally, I will want to discuss with you the rules that you should follow in determining whether the defendant, the United Mine Workers, the International Union, the defendant in the case, was responsible for any violation of the labor-management relations act, if you find that there was such a violation.

After discussing with you, then, the matters relating to the labor-management relations act, I want to turn your attention next to the alleged wrongful interference with contract, that constitutes the second major phase of the lawsuit. The so-called common-law basis of recovery as distinguished from federal and statutory basis of recovery. In that regard I will want to discuss with you the torts, and the word tort is just a French word for wrong, the tort or the wrong of unlawful interference.

Next I will want to discuss with you the rules that you will want to follow in determining whether the UMW, the defendant in this case, the United Mine
838 Workers, has a responsibility for any wrongful interference. In that connection I will want to discuss problems relating to agency and I will want to discuss problems relating to conspiracy.

Finally, in the latter part of the charge, I will want

to discuss with you the matter of damages and what you should look to if you should arrive at that point in your deliberations where you consider damages, what you should look to and what you should not look to. First I will want to discuss with you the matter of the rules in connection with compensatory damages and finally the rule in connection with punitive damages.

Turning your attention, then, to the respective contentions of the parties, of course this is an action by Paul Gibbs against the United Mine Workers of America for damages alleged to have been sustained by the plaintiff, Mr. Gibbs, as a result of a so-called secondary boycott arising out of a labor dispute, and for damages as a result of interference with certain contractual relations with the plaintiff, both of these arising out of the same labor dispute.

The plaintiff contends in this lawsuit that sometime prior to August 15th of 1960 that he had an employment contract to act as superintendent of several mines for the Grundy Mining Company at a salary of $600 per month, and in addition that he had a truck hauling contract with the same Union to haul coal mined at 78¢ per ton. The plaintiff alleges that on August 15th
839 1960, he and some 18 or 20 miners attempted to report to begin mining operations for Grundy Mining Company, but that picket lines had been organized which by violence and threats of violence prevented the plaintiff or the miners with him from entering upon the mine property, thereby depriving plaintiff of the benefit of his contract of employment, and thereby depriving him of the benefit of his contract for hauling coal.

The plaintiff contends that the defendant or its agents were responsible for these actions, inducing or encouraging the employees of Grundy Mining Company not to work, and that the defendant was therefore guilty of a

so-called secondary boycott in violation of the labor-management relations act.

Now, the pertinent provision of this act provides as follows, and as I have indicated to you earlier, this—the statute or the pertinent provisions of it will be set forth also in the verdict form for your further guidance and assistance. Section 29, U. S. C. A. 158 (b), "It shall be an unfair labor practice for a labor organization or its agents to engage in or to induce or encourage any individual employed by any person engaged in commerce or industry affecting commerce to engage in a strike or a refusal in the course of his employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, goods or commodities; or to perform any services; or to threaten, coerce, or restrain any person engaged in commerce or industry af-
840 fecting commerce where in either case the object thereof is forcing or requiring a person to cease doing business with any other person; provided that nothing contained in this clause (b) shall be construed to make unlawful where not otherwise unlawful any primary strike or primary picketing." Now, the statute goes further and says that: "Whoever shall be injured in his business or property by reason of any violation of the statute—which I have just read to you—may sue therefore, and shall recover the damages by him sustained."

Thus, the plaintiff contends that the defendant Union or its agents were guilty of a secondary boycott in violation of this statute in picketing Grundy Mining Company and thereby inducing or encouraging the employees of Grundy to engage in a strike or in a refusal in the course of their employment to perform any services, for the object or purpose of forcing Grundy to cease doing business with the plaintiff as a mine superintendent or

as a trucking contractor; and further contends that the defendant or its agent was guilty of a so-called secondary boycott, in violation of this statute, in threatening or coercing or restraining Grundy for the same object or purpose.

Now, in addition the plaintiff contends that the picketing of Grundy in view of its object and its result constituted a wrongful interference with the plaintiff's em-
ployment and trucking contract in violation of the
841 common-law of Tennessee. And that the defendant
is responsible therefore because the picketing was committed by persons with whom the defendant had conspired to interefere with the contract of the plaintiff.

Turning your attention now to the contentions of the defendant, those being as I have now stated those of the plaintiff. The defendant denies that the picketing of Grundy constituted a so-called secondary boycott in violation of the labor-management relations act, and denies that the defendant was responsible for such picketing. That is, the defendant denies that the picketing had the object or the purpose of forcing Grundy to cease doing business with the plaintiff, and denies that the plaintiff or its agents participated in such picketing. Likewise, the defendant denies that the picketing constituted a wrongful interference with the plaintiff's contract in violation of the common-law, and again denies that the defendant was responsible for such picketing. That is, the defendant asserts that the picketing was lawful rather than wrongful, and denies that the defendant or its agents conspired with others to interfere with the plaintiff's contract.

Now, those are the respective contentions of the parties.

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846 Turning your attention now to some general rules that you will want to follow in conducting your de-

liberations and in arriving at a verdict. Of course it is the duty of the jury to reconcile the differences of the parties and to determine in the light of the Court's instructions what the results of this lawsuit should be. The plaintiff contends and the defendant denies that the picketing of Grundy Mining Company constituted two legal wrongs, a so-called secondary boycott and violation of the labor-management relations act, and a wrongful interference with the plaintiff's contractual relations, and a violation of the laws of Tennessee in that respect.

I will instruct you as to the law concerning these legal wrongs and it will then of course be your duty to reconcile the claims of the parties by determining whether the picketing constituted either, neither, or both of these legal wrongs, the picketing and other activities.

Secondly the plaintiff claims and the defendant denies that the defendant was legally responsible for the picketing and any legal wrong which it constituted. Again, I will instruct you as to the law concerning the legal responsibility of a union such as the defendant was for such picketing and activities as testified to, and if you find that the activities and picketing constituted either or both of the legal wrongs charged, it will be your duty to further reconcile the claims of the parties by determining
847 whether the defendant was legally responsible for the activities and for the so-called picketing.

Before instructing you specifically as to these matters, let me, as I say, state some general rules relating to the burden of proof, the preponderance of evidence, and the credibility of witnesses.

Directing your attention first to the matter of burden of proof, the plaintiff charges that the defendant has been guilty of one or more wrongs, and has in consequence injured the plaintiff and has caused loss or damage to him. Now, to be entitled to the relief that he seeks the plaintiff

is required to prove his charges, and it is therefore said that the burden of proof, the over-all burden of proof in the case is upon the plaintiff. Now, where a burden of proof rests upon a particular party, as it does upon the plaintiff in this case, that party is required to prove his claim by a preponderance of the evidence. By a preponderance of the evidence is meant merely the greater weight of the evidence, which is not necessarily determined by the greater number of witnesses, but by their character and their intelligence, their means of knowledge touching upon the subject matter about which they testify, their interest or lack of interest in the results of the trial, their sympathy for or prejudice against any party such as is apparent or becomes manifest, the consistency or inconsistency of their statements, their demeanor while
848 upon the witness stand, and the reasonableness or unreasonableness of their testimony.

Now, if the plaintiff carries the burden of proof by a preponderance of the evidence, however slight that preponderance might be, he has done all that is required of him and is entitled to a verdict. Upon the other hand, if the preponderance of the evidence favors the defendant, then the plaintiff has failed to carry his burden of proof and the defendant is entitled to a verdict. Likewise, if the evidence is evenly balanced between the plaintiff and the defendant, the defendant is entitled to a verdict, because the general burden of proving the case is upon the plaintiff. You do not have ties in lawsuits, in respect to the burden of proof.

Turning your attention then to the matter of credibility of witnesses, you of course are the sole and exclusive judge of the facts of the case, and of the weight and of the credibility that you give to the various witnesses. If there is any conflict in the evidence you will want to reconcile the conflict if you can without hastily or rashly concluding

that any witness has sworn falsely, for the law presumes that every witness has either told the truth or attempted to tell the truth. That is, that presumption prevails until the contrary appears to the satisfaction of the jury.

Now, let's turn our attention to the problem of the labor-management relations act. In this regard particularly
849 and in all respects we must be careful not to substitute our own personal opinion of what the law ought to be for what the law is, because I think you can readily recognize that if the jury or the court were to begin substituting their opinion as to what the law ought to be, as distinguished from what the law is, then we would destroy in a very short time our constitutional method of making and enacting and enforcing laws. So, in regards to charging with respect to the law, I ask that you give me your careful attention and that you follow the Court's instructions as to what the law is, even though you might have a personal reference that the law was something other than that.

We have used the term secondary boycott rather frequently throughout this case, as describing the offense charged under the federal labor-management relations act. Actually the word secondary boycott does not appear in the statutes itself as you will see when you see the verdict form. But, they are a rather convenient method of expressing an idea. They do not, however, express the exact meaning or the exact terms of the law itself, and therefore you must look to the ordinance itself or the statute itself in determining just exactly what it is that is described as unfair labor practices, and what it is that is prohibited.

So, now turn your attention to the law applicable as I say to the so-called secondary boycott of the case,
850 that is the labor-management relations act. This act gives a right of action against a union to anyone who has been injured in his business or property by

reason of a violation by that union of the so-called secondary boycott provision.

Under the act a union or its agent has the right to induce or encourage the employees of an employer to engage in a strike or a refusal in the course of their employment to perform any services or even to threaten to coerce or restrain such employer when the object of the union's activities is to obtain a collective bargaining agreement from the employer. Union persuasion or activity of this type is referred to as primary activity, and picketing of such an employer by a union or its members for such a purpose or such an object is referred to as primary picketing.

Primary picketing or union activities does not violate the provisions of the labor-management relations act, with which we are concerned, regardless of whether it was carried on by employees of the employer, or by others, and the union is not liable under the act for any loss which the employer or any other person may sustain by reason of such primary activity. On the other hand, the act makes it unlawful for a union or its agents to induce or encourage the employees of an employer to engage in a strike or a refusal in the course of their employment to perform services, or to threaten, coerce, or restrain such an em-
851 ployer, when the object of the union's activity is to force or to require the employer to cease doing business with any other person. Union persuasion of this type is referred to as secondary activity, and picketing of such an employer by a union or its members for such a purpose is referred to as secondary picketing.

Secondary activity violates the provisions of the act of which we are concerned, and the act makes those responsible for secondary activities liable for any loss which the employer or any other person may sustain by reason of such secondary activity.

In determining whether the act has been violated by

picketing which induces or encourages the employees of an employer to engage in a strike or in a refusal in the course of their employment to perform any services, or by the threatening, coercing or restraining of an employer, the question is not so much whether violence or threat of violence has been employed, as it is whether the object of the union activity was proper within the meaning of the act. It is the object of the activity that is made unlawful by the act, and not the means involved. If the object of the activity was lawful, then the fact that violent means were employed does not mean that picketing was a violation of the federal labor-management relations act. On the other hand, if the object of the activity was unlawful, the fact that only peaceful means were employed does not protect those responsible for liability under the act. So it is the object of the union activity and not the means that determines whether the activity is primary or secondary, that determines whether it is lawful or unlawful under this act.

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These are the general rules that you must consider in passing upon the question of whether or not the activity toward Grundy Mining Company constituted a secondary boycott in violation of the labor-management relations act. There is, however, one further matter that you must consider in this regard, and that is whether or not Grundy Mining Company was engaged in commerce. So let us look to the definition of commerce, referring again to the act, it is there stated that: "It shall be an unfair labor practice for a labor organization or its agents to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in a strike, refusal, etc." Therefore, in determining whether the picketing of Grundy Mining Company violated the act, you must determine among other matters whether or not Grundy was "engaged in commerce

or in an industry affecting commerce." In this connection I would charge you that the term commerce means trade, traffic, commerce, transportation or communication among the several states, or between points in the same state but through any other state. Now, I am reading there from 29 U. S. P. A. 152, sub-paragraph 6; reading from sub-paragraph 7 in the same code section: "The term affecting commerce means in commerce or obstructing commerce or the free flow of commerce." It is easy
853 to see the jurisdiction of the federal courts or of congress is based upon the so-called commerce clause of the Federal Constitution, relating to the authority of Congress to regulate matters in inter-state commerce or affecting inter-state commerce.

Turning your attention next to the problem or the problems involved in connection with the alleged responsibility of the defendant, the United Mine Workers of America, the International Union, for the alleged secondary boycott. If you find that the activity and the picketing toward Grundy Mining Company constituted a violation of the labor-management relations act, you will then come to the question of whether the defendant was legally responsible for such activity. You will recall that the act makes it unlawful for "a labor union or its agents to induce or encourage, etc." Now, the plaintiff contends that the agents of the defendant participated in the picketing of Grundy, and that the members of the local union who took part in the picketing were acting as agents of the defendant. On the other hand, the defendant denies that its agents participated in the picketing of the activities directed toward Grundy, denies that it authorized any agents to picket for any unlawful object, and denies that the members of the local union were acting as its agents in that respect.

As to any person claimed to have been involved in an

act as agent of the International Union, the plaintiff
854 must prove the existence of a agency relationship. That is, the existence of the agency relationship and the extent of the agency authority, unless the plaintiff has shown that a particular individual is the agent of the defendant International Union, the defendant cannot be held responsible for the acts of such individual. Declarations or statements of the supposed agent himself as to the extent of his agency or the extent of his authority are not proof thereof. Membership in a local union alone, for example, does not constitute a member an agent of the union, either the local or the international. The fact that a member of the defendant union is an officer in a local union affiliated with the defendant International Union does not in itself constitute such local union official an agent of the defendant International Union.

Now, members of a labor union have a right to engage in picketing or similar labor activities even though they are not asked to or directed to do so by the union to which they belong. The mere fact that such picketing or such labor activity occurred is not evidence necessarily that it was directed by the union. The defendant was under no legal obligation to disavow acts of individual members or local unions which it did not authorize or direct. You may not find that the—you may not find the defendant liable on the basis that it did not deny or did not dis-

avow such action. You cannot find that an agency
855 relationship existed as between the defendant International Union and any particular individuals on the basis of speculation or guess. You are warranted to finding an agency relationship as to a particular individual only when—only in the event that such relationship is established by direct evidence or by circumstantial evidence which does not reasonably admit any other conclusion.

For the purposes of the labor-management relations act, in determining whether any person is acting as a "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified is not controlling. Now, in the case of course it is agreed and stipulated by the parties that agents or officials of the United Mine Workers District 19, with headquarters at Middlesboro, Kentucky, that such agents while acting within the scope of their employment with District 19 were agents of the defendant UMW International, for the purposes of this lawsuit.

For example, it is stipulated that for the purpose of this lawsuit that George Gilbert is and was an agent of the defendant United Mine Workers International, to the extent that he may have been acting within the scope of his employment for District 19.

Turning your attention now to the second major phase of the liability question in this case, let's discuss the law relating to wrongful interference with contract, the
856 so-called common-law phase. I have on other occasions explained to you and distinguished to you the difference between common law and statutory law, you will recall common law being those rules and regulations that have been developed over the long history of Anglo-American judicial system, as distinguished from laws which have been enacted by legislatures, and in this case laws enacted by Congress.

We come now to the plaintiff's claim that the picketing of Grundy Mining Company constituted a wrongful interference with the plaintiff's employment and with his truck hauling contract, in violation of the common law of Tennessee. Under the common law a wrongful interference includes all invasions of contractual relationship by unlawful means, including any act injuring or destroying per-

sons or property which retard or make more difficult or prevent performance or make performance of the contractual relationship less valuable to the parties thereto.

Now, before there can be a recovery for a wrongful interference, the contractual relationship, it must be shown that the interference was intentional. That is, that the interference was committed intentionally with the knowledge of the relationship claimed to have been interfered with. In addition, of course, the interference must have been wrong that is without legal justification or legal excuse. The plaintiff's contention in this regard is
857 that the activities and picketing of Grundy constituted an interference with his contractual relationship with Grundy, and that this interference was intentional, that it was wrongful in that it was accomplished by unlawful means, including violence and threats of violence. In other words, the plaintiff claims that the picketing involved acts of violence of threats of violence in breach of the peace, relative to the plaintiff's mine and trucking operations, or his mines and trucking operations, and that such conduct damaged him.

With regard to the alleged wrongful interference as distinguished from the alleged secondary boycott, it is the lawfulness of the means rather than the lawfulness of the object or the purpose of the picketing which is controling. It is not a wrongful interference for a union to induce employees by fair and by peaceful persuasion to withhold their services from an employer in order to obtain a collective bargaining agreement or to obtain wages and working conditions agreeable to them.

On the other hand, it may be a wrongful interference for a union to seek such end or such object if it does so by unlawful means. Such means as violence or the threat of violence, and thereby interferes with and causes damage to the contractual relationship of another. Now, in

this regard let's direct our attention to the legal problems connected with the alleged responsibility of the UMW, International Union, for the alleged wrongful interfer-
858 ence. If you find that the picketing of Grundy Mining Company constituted a wrongful interference with the plaintiff's contractual relations in violation of the common law, then you will come to the question of whether the defendant was legally responsible for such interference. The plaintiff asserts and the defendant denies that the defendant is responsible for any interference of the plaintiff's contract, because the defendant was a party to a conspiracy pursuant to which the interference was committed. A conspiracy may be defined as an agreement between two or more persons or two or more organizations or associations, two or more persons to do an unlawful thing, or to do a lawful thing by unlawful means. The agreement to pursue an unlawful purpose or to accomplish a lawful purpose by unlawful means is essential to the existence of a conspiracy, but of course this agreement need not be expressed, need not be set forth in so many words, need not be in writing, or anything of that nature, it may be implied or it may be tacitly understood between the co-conspirators. Or, rather, it may be proved by proving other facts from which the existence of a conspiracy may be reasonably inferred. It is not essential to the existence of a conspiracy that the agreement between the conspirators be formally made between the parties at any one time, if, for example, two persons agreed to pursue an unlawful purpose or pursue a lawful purpose by unlawful means, then later a third person with knowledge of the existence of the conspiracy assents to it either im-
859 pliedly or expressly and participates in it, then all three are conspirators in the same conspiracy. It is not necessary that all of the conspirators ever meet together, all that is required is that each party to the con-

spiracy know of the existence of the conspiracy and that each agrees to assist in some manner in the furtherance of the unlawful purpose. Thus—or any unlawful means of accomplishing an unlawful purpose. Thus a conspiracy is in the nature of a partnership to violate the law. There must be some intentional participation in the illegal scheme or design or purpose. If the parties in any manner work together to advance the unlawful scheme, having its promotion in view, then they are all conspirators and each is liable for any unlawful act performed by another conspirator pursuant to or in furtherance of the conspiracy.

The defendant Union is of course an association of individuals. Necessarily any conspiracy entered into by the defendant was done by its individual officers or agents or members. It can only operate through people, in other words. As I have indicated, the defendants would not be responsible for any acts or agreements done or entered into merely because it was done or entered into by a member of the Union, because union membership alone does not constitute the member an agent of the union for the purpose of engaging in or committing a conspiracy. As I have further indicated, it is agreed and stipulated that the agents or officials of United Mine Workers
860 District 19, while acting within the scope of their employment with District 19, were agents of the defendant, the International, for the purpose of this lawsuit. So, for the purpose of this lawsuit, as I have previously illustrated, George Gilbert was and is an agent of the defendant, the International, to the extent that he may have acted within the scope of his employment. In considering whether or not, for example, the International was a party to any conspiracy.

The question of whether or not an agent of the defendant was authorized to enter into any conspiracy on behalf of the defendant is a question of fact for you to decide

from the evidence. Before the defendant may be held responsible for the acts of its agents in entering into a conspiracy during the course of a labor dispute, there must be clear proof that the particular conspiracy charged or the act generally of that nature had been expressly authorized or necessarily followed from a granted authority by the defendant, or that such conspiracy was subsequently ratified by the defendant after actual knowledge thereof. The custom or traditional practices of the defendant can be the source of actual authorization of an agent to act for and to bind the defendant. If there was no prior authorization of agent, the defendant would be still responsible if with full knowledge of the nature and the character of the act of the agent, and with intent to adopt them, the defendant subsequently ratified or approved or accepted the benefit of such action.

861 If you find that the defendant through authorization combined with others for a common purpose to do any of the common-law wrongful acts alleged, then you may consider all of the evidence to determine whether the acts were done in concert in accordance with the common purpose, and to effect a common design. And if damage to plaintiff's property or business resulted directly from such a conspiracy, then you may consider whether the defendant was responsible for the damage and the injury.

Turning your attention now to the matter of damages, should you arrive at that point in your deliberations, if you find for the defendant upon either or both of the plaintiff's claims of a secondary boycott, and or a wrongful interference, then your verdict will be for the defendant upon such claim or claims, and that would end your duties as to such claim or claims.

Upon the other hand, if you find for the plaintiff upon

either or both of these claims, and if you find such a violation of the law directly and proximately resulted in damage to the plaintiff, then it will be your duty to go further and to assess his damages in accordance with the instructions that I give you.

The plaintiff alleges he sustained damages as a result of both of the alleged wrongs. Of course he can
862 only one damage for each of the alleged violations.

But, depending on how your verdict may be he may be entitled to recover the damages by reason of violation of the labor-management relations act, or by reason of violation of—of the wrongful conspiring to wrongful interfere with contractual relationships, or by reason of both. As I say, if for example you should find that he is entitled to recover by reason of both, he would still be entitled to recover only one damage with respect to each alleged contract upon which he claimed he sustained any loss.

The plaintiff, as I say, alleges the same damage as a result of both of the alleged wrongs. That is, the loss of the benefit of his contract of employment and the loss of his hauling contract with Grundy Mining Company. When a party is deprived of the benefit of such contract as a result of a secondary boycott under the labor-management relations act, or as a result of wrongful interference with a contractual relationship, then he is entitled to recover the value of such contract, and the measure of damages is the sum which he would reasonably have earned if the contract had been continued and had been performed, less any necessary expense incident to the earning of that sum. And taking into consideration, of course, the duration of the contract, considering such matters as whether the contract was terminable at will or how long the contract may have been in existence. The plaintiff's right to

recover damages is, of course, limited to actual
863 damage, the amount of which, if any, must be determined with reasonable certainty from the evidence. In the event that your verdict is for the plaintiff, you may award him only such damages as will fairly and reasonably compensate him for the injuries and the damages which you find from a preponderance of all of the evidence in the case he has sustained as a proximate and direct result of the action of the defendant. And of course in accordance with the instructions of the Court.

You will not be permitted and it would not be proper to award any speculative damages. Now, this means that you would not include in your verdict compensation for prospective loss which, although possible, is remote, or upon which there is no proof in the record upon which you can base a verdict. Damages can be awarded only to the extent that the various elements have been proved by the evidence in the case; and as I say, you should not speculate upon damages upon which there has been no proof.

No award of damages can be made to the plaintiff on the basis of losses sustained by the plaintiff as a result of lawful activity upon the part of the defendant or its agents. If you should award damages, you must remember that it was the duty of the plaintiff to minimize the damages as far as reasonably possible. Therefore, if you find that the plaintiff is entitled to recover damages but that he could have reasonably, and in the existence
864 of due diligence, minimized the amount by taking any measures suggested in the evidence, it is your duty to consider that factor or those factors in assessing damages.

Turning your attention now to the issue of punitive damages, which are claimed by the plaintiff in this case. Plaintiff, of course, has sued for punitive damages as well

as compensatory damages, and the instructions that I have just given you are directed toward the matter of compensatory damages. Punitive damages cannot be awarded by reason of a violation of the labor-management relations act. The only damages that can be awarded under that act are the actual damages, because the act provides that if a violation is committed he may recover actual damages, and doesn't say anything about punitive damages or other types of damages. So under the labor-management relations act there would be no recovery for—or no recovery of punitive damages.

Upon the other hand, punitive damages may be awarded for a wrongful interference with contractual relationships, if it is found that such wrongful interference was committed with malice or with personal ill-will or hate or spite or any improper motive. The rule in this regard is that if a verdict is returned for the plaintiff upon the wrongful interference charge, and if compensatory damages are to be assessed—first that compensatory damages are to be assessed upon a careful consideration of the matters I have mentioned relating to the value
865 of the contract, its duration, the plaintiff's duty to minimize damages. Then if actual damages are found to exist, punitive or sometimes described as exemplary or sometimes described as vindictive damages may be awarded against the defendant found to have acted with malice. I say it may be awarded within the sound discretion of the jury. In this respect the jury may award such punitive damages as they in their sound discretion would find appropriate.

In this situation the punitive to be awarded would depend upon the circumstances in accordance with whatever may be regarded properly as the expense or the enormity of the wrongfulness of the defendant's action, the extent of any malice involved, and as an example or

as a punishment to deter the defendant or to deter others from a commission or from the commission or similar acts.

Now, gentlemen, are there any special requests at this time?

Mr. Van Derveer: May it please the Court, we offer as a suggestion to the Court, I believe the Court just inadvertently overlooked the witness C. H. Kilbey.

The Court: Oh, yes, Mr. Kilbey, the accountant who testified with respect to the income tax returns of Mr. Gibbs. Ladies and gentlemen, go at this time to your lunch and report back at two o'clock. Do not discuss the case among yourselves, don't begin your deliberations yet, we're not ready for you yet to start talking about it among yourselves. Wait until after you have come back, and if there are any further instructions the Court will give them to you at that time, and then you may begin your deliberations. If you will, when you come in, if we are in the process of any other matters at that time, just have a seat in the courtroom. At two o'clock or when you are all back I will ask you to come here and stand and give you any additional instructions. Then of course you will retire to begin your deliberations. Before you retire, of course, I will want to give you the verdict form and to perhaps discuss a little bit further with you the various issues and the various questions that you will be asked to answer in your deliberations. You may be excused at this time.

866

Noon Recess.

The Court: In regard to the instructions that I have heretofore given you relating to the common-law charge of a conspiracy to commit interference with a contractual relationship of the plaintiff, I would want to charge you further and instruct you further that where

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a union has a legitimate object or goal, such as to secure a bargaining agreement, it may give aid and assistance to employees who are picking a given employer. The union may give such aid and assistance even though prior thereto such employees may have engaged in violent conduct on or near the employer's property. By giving aid and assistance under such circumstances the union does not ratify or make itself liable for the prior violent acts, if any, of such employees.

Now, then, as you were advised prior to the argument and as an introduction to the argument of the case, the Court has prepared a series of interrogatories or a series of questions which you will respond to as your verdict in this case. This is referred to sometimes as a special verdict, as distinguished, in other words, from a general verdict. You are called upon, in other words, to answer these questions and only these questions that are set forth in this verdict form. Those matters upon which there may have been testimony which matters are no longer listed in the special issues you are to decide, you will not consider those matters. Likewise, if you should come
868 in your deliberations to a consideration of damages, you would consider only the evidence in the record relating to damages by reason of the employment contract, should you find that the plaintiff was entitled to recovery in that respect, or in regard to the coal hauling contract, should you find that he was entitled to recover for any reason in that respect; and those contracts with Grundy with respect to Grundy Mining Company only. You would not consider any evidence received in the case with respect to any alleged damages by reason of any other employer, any other coal company, any other party; such as, for example, any evidence with respect to any alleged damages by reason of action of the Union toward Tennessee Products Company, toward George Ram-

sey, or toward Tennessee Consolidated. But only, in other, the verdicts in the special issue are limited to the problems that may have arisen with respect to the Grundy Mining Company and the plaintiff, and the contract between the plaintiff and the Grundy Mining Company.

I don't think that it is necessary for me to repeat again the wording of the questions. Perhaps the first time I read the questions they were not as meaningful as they are, after you have heard the argument. But, in any event, if you have any question about the inquiries you are called upon to answer, do not hesitate to let the Court know of that and you will be brought back for clarification in that respect. Now, you will be called upon,
869 of course, to exercise your best faculties in deciding this case, and you will be called upon to follow the instructions given in the special interrogatories. The instructions may seem a little bit complicated but I think if you will just take the questions and just answer them one at a time, and answer them in the sequence that they are asked, I believe that you may not have any difficulty in understanding what issues you are called upon to decide. But, if you do have, don't hesitate to let us know.

Of course the jury is about to take the case now for the ultimate job of judging in the case, and I know you will, but just again to caution you, that you should—and to urge you, that you should use every power that you possess to eliminate from your deliberations any feeling of prejudice, any feeling of sympathy, any feeling of bias, that you might have for or against any party or either party in the lawsuit. We, of course, are dealing in this lawsuit with the field of labor-management relations, and it is a field in which many people do have personal feelings. Many people do have strong opinions one way or the other, and I just urge you that you not allow any personal feelings, any sympathies or any prejudices, that

you might have, to divert you from deciding this case strictly on the basis of the evidence as it has been given to you, and on the law, as you have been instructed. Don't consider the case just in the light that there is a labor organization, for example, on the one hand, or
870 that there is an individual on the other hand. The same as when we have cases, for example, involving an individual and a corporation. Every party is entitled to be treated equally in a case, and to have their case considered upon the merits, and that is what you are asked to do in this case.

If you will, then, at this time the—oh, yes, the instructions of the Court as heretofore given you with respect to punitive damages will remain the same. I did not mean in any way to alter those instructions. At this time, then, the alternate jury, I believe, has served her purpose and I thank her very much. Of course elect one of your members as foreman, now. Conduct your deliberations in an orderly manner, and don't hesitate to come back if you do want any additional instructions.

Whereupon the jury retires to deliberate the case.

(For further proceedings, see Appendix F and Verdict Form as filed by the jury.)

i **HEARING IN CHAMBERS, NOVEMBER 14, 1962.**

Chambers hearing—11/14, following Charge to jury.

Mr. Kramer: Our first additional request—I can hand it to you, but I don't know whether you can read my writing; I haven't been able to get a stenographer to write it.

The Court reads the said request. The request was argued by counsel.

The Court: I am making the notation, "Declined. Covered in substance and in special issues."

The Court: Your second additional request (reading). Request argued by counsel.

The Court: I think that the fourth and fifth additional requests should be declined; the second and third I will attempt to cover in substance.

The Court: All right. Anything further?

Mr. Kramer: That's all the requests we have, your Honor. I do have our objections to this charge; would your Honor prefer that we make them now?

The Court: Yes; make them now, while we are here.

Mr. Kramer: Our first objection, your Honor, is, we object to the portion of the Court's instructions, to that portion of the Charge of the Court wherein he defined, or stated what constitutes primary picketing and secondary picketing. The instructions, your Honor, in connection with these two terms described primary and secondary picketing solely in terms as to the objects of the
ii picketing; it does not take into consideration the place or the situs of the picketing.

Our second objection, your Honor, is to the portion of the Charge with reference to defining agency agreement. This portion of the Charge, we think, does not fully describe what constitutes the agency agreement, as this applies to that portion wherein the Court is discussing the picketing, and whether or not the pickets and the defendants entered into such an agreement, or whether they were acting in their individual capacity or even as representatives of the local union.

The Court: I'm afraid I don't follow your understanding, Mr. Kramer.

Mr. Kramer: Your Honor, your Honor did define to some extent "agency", but we do not think that it is clearly enough defined so that the jury can properly draw the distinction between whether or not they were acting—these people who were up there on the picket line—whether

they were acting individually, for themselves, or whether they were acting as representatives of the local union, or whether they were acting as representatives of the International.

The Court: All right.

Mr. Kramer: Now, your Honor, the only additional objections we have are to the other special requests—the special requests which we have submitted and which your Honor has declined again. I don't know whether I need to argue them again.

iii The Court: No; you need not.

Mr. Kramer: We understood that objection covers our request which was given in No. 6 under our first head of submitted requests, and that one we understood the other day your Honor to say that you were going to give, when we were discussing the requests, but I don't believe your Honor gave it.

The Court: All right. (The Court reads 6.) I think that was given verbatim, I believe.

Mr. Kramer: You say your Honor did give that charge?

The Court: I gave No. 6. "Members of a labor union have a right to engage in picketing or similar labor activities even though they are not asked or directed to do so by the union to which they belong"——

Mr. Kramer: Your Honor, you are not reading on the same one, the one that is 6 under heading II, on page 5.

The Court: Oh! on heading II. Let's see; "Where a union has a legitimate object or goal (reading through the entire paragraph 6)." I did not; I intended to give that, yes. Yes; I will give that.

Mr. Kramer: That's all, your Honor.

The Court: Now talk, if you will, Mr. Kramer, about the first objection, what constitutes primary and secondary picketing solely in terms of the object and not in terms of the situs. What is your contention in that respect?

Hearing in Chambers, November 14, 1962

Mr. Kramer: Our contention, your Honor, is that
iv where it is at the location, the picketing is at the location of the person that is being picketed is at the situs of these mines or whether somewhere else the picketing is conducted there, we think the fact that that picketing is conducted there is an element to be taken into consideration in determining whether it was primary or secondary picketing. If they had conducted picketing against the Grundy Mining Company somewhere else than at the very particular place that Grundy was going to do the work that these people were objecting to, that would have been given consideration on whether or not it was primary or secondary, but the location of the picketing is also a matter to be taken into consideration in determining whether or not this picketing is primary or secondary.

The Court: Well, wouldn't the location, though, go to the question of what was the object; I mean if it was done at Grundy, that might be considered as Grundy being the object.

Mr. Kramer: I think, your Honor, that that might be considered, but I don't think it is clear, and I think the courts have held that where it is at the place where the dispute arises and with the parties with whom the secondary boycott is alleged to have occurred, that is entitled to consideration by the jury in determining whether or not it is primary or secondary; it isn't alone the object, but the location is also vital.

v (The point was further argued by counsel for the parties.)

The Court: All right. In order that we may be clear first, with regard to your first objection, I think that the issue you are raising there is one that the Court is at best uncertain about, and we are at the stage of the case where the jury is ready to go out after five or six days, I am

going to decline—overrule that objection. I'm going to overrule it partly on the grounds that the provisions in the pre-trial order provide that requests for special instructions have to be filed timely. I am doing that, quite frankly, gentlemen, because I do not have the time and opportunity at this point to go into that rather—possibly complicated question, and the danger of any error in the Charge, it seems to me, is too great. I haven't heretofore asserted the provision of the pre-trial order with respect to special requests; I wanted to be as liberal as I could in order to get all the assistance I could from the attorneys. Under this circumstance likewise I don't want to have to try this case over if we can possibly help it. I want to use that as an additional ground to try to avoid any error in the record if I can.

Now, with regard to your second objection, with regard to the matter of agency, I believe that objection should be overruled.

With regard to your third as to the Court having
vi declined special request No. 6 under Roman numeral
II, that will be charged. The other rulings made heretofore on your other requests will stand.

The additional special request No. 1, I've already commented on that; I am declining that, but I will cover it in substance and special issues, as will be the case in the second additional request, the third additional request; I am declining the fourth additional request and the fifth additional request.

Mr. Van Derveer: Again for the record, no objections.

(Whereupon this hearing was concluded.)

STIPULATION.

Come the parties by counsel and subject to the approval of the Court and stipulate as follows:

1. In the above styled action immediately following the argument of counsel to the jury at the close of evidence, counsel for the defendant in Chambers moved the Court for a mistrial, such motion being based on the ground that argument of counsel for the plaintiff was improper. The motion for mistrial was overruled by the Court.

2. The aforesaid motion and the action of the Court thereon was inadvertently omitted from the transcript of proceedings. By this stipulation the parties agree to correct the transcript in this record to the end that the Court may consider the recitals of paragraph 1 above to the extent that it may be material on the respective appeals.

[fol. 522] APPENDIX A.

The following is a part of the discussion between the Court and counsel on the special verdict form. The court is speaking to Mr. Van Derveer, attorney for the plaintiff (Appendix E, pp. 30-31, Chambers Hearing of November 13, 1962):

"The Court: Well, here's your problem, Joe. Now, I realize that you do not look with favor of special issues, but I think that you're so familiar with the state practice that you overlook the fact that in the federal rule—the federal court the rule is different. And that is one the—in the federal courts, a general verdict—in the state courts, a general verdict if it can be supported by any theory is supported. In the federal courts where it's a federal question involved, a general verdict unless it can be supported by all theories, has to be reversed and sent back. So we're going to have to work out special issues here that will tie down the issues sufficiently that we know what the jury has decided. If you don't, and you get up to the court of appeals on the question, then if there is any theory upon which there is no evidence, then the general verdict must be reversed and sent back. Now, I don't know whether you've been aware of the difference in that respect or not, but in any event, that seems to be the federal rule. And for that reason, it's going to be highly desirable, if we're going to get this law suit settled once and for all and not have to retry it, possibly, to get these special issues pinned down. And one issue is which one of these things is it that the defendant committed. Now, I can submit to the jury all three of them, namely that the defendant—whether the defendant did or did not engage in this, whether the defendant did [fol. 523] or did not induce, encourage, whether the defendant did or did not threaten or coerce.

"Mr. Van Derveer: Well, I thought your Honor, of course, was referring to the charge, but your Honor is also referring to the charge and the special issues.

"The Court: What I have in mind—both of them . . .

"Mr. Van Derveer: Now, it seems to us that on the special issue, that if that is the intent of the Court, that it should be just in the exact words of the statute. Did the union quote 'engage in, induce or encourage' . . .

"The Court: Well, I think we are going to have to submit those issues separately, because suppose I submitted engage in, induce or encourage, and then the jury comes back and finds 'Yes.' And then suppose when they examine the proof carefully, or the Court of Appeals examines the proof, they say well, now there is evidence which you might hold that they induced or encouraged, but there is no evidence that they engaged in. So therefore, we'll have to send this case back for re-trial."

[fol. 524]

IN UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Nos. 15,624 and 15,625

Before: Cecil, O'Sullivan and Phillips, Circuit Judges.

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—
October 15, 1964

These causes are argued by Willard P. Owens and E. H. Rayson for United Mine Workers and by Clarence E. Walker and William Ables, Jr. for Paul Gibbs, and are submitted to the Court.

[fol. 525]

Nos. 15624-25

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PAUL GIBBS, Plaintiff-Appellee,

v.

UNITED MINE WORKERS OF AMERICA, Defendant-Appellant.

PAUL GIBBS, Plaintiff-Appellant,

v.

UNITED MINE WORKERS OF AMERICA, Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Tennessee.

OPINION—Decided April 6, 1965

Before Cecil, O'Sullivan and Phillips, Circuit Judges.

O'SULLIVAN, Circuit Judge. Plaintiff Paul Gibbs, appellee in No. 15,624 and cross-appellant in No. 15,625, recovered a $75,000 judgment entered on a jury verdict against defendant United Mine Workers, appellant in No. 15,624 and appellee in No. 15,625. No. 15,624 presents the United Mine Workers' appeal from such judgment. No. 15,625 is Gibbs' cross-appeal from the setting aside of one item of the jury's award of damages. This case is the latest in a series in which we have considered the collisions between the UMW and those who have sought to operate coal mines in Kentucky and Tennessee without signing UMW

[fol. 525a] contracts.[1] The violence here involved was less spectacular than that described in those decisions. From the evidence, the jury could and did find that by violence and continued picketing the UMW prevented the Grundy Mining Company from opening a coal mine field in the Gray's Creek area of Marion County, Tennessee, and thereby deprived plaintiff Gibbs of his contracts to superintend the mine operation and to truck coal from the mines. Gibbs' complaint charged in substance that the objective of defendant's conduct was to induce and force employees of Grundy Mining Company to refrain from working in the mines, thereby causing Grundy to cease doing business with him as its superintendent and as an independent trucking contractor. His pleadings asserted that defendant's actions constituted a secondary boycott prohibited by Sections 8(b)(4) and 303 of the National Labor Relations and Taft-Hartley Acts, 29 U.S.C.A. §§ 158(b)(4) and 187, and violated the common law of Tennessee as an unlawful interference with his contracts of employment and haulage.

Motions to dismiss and for direction of a verdict were denied. Interrogatories submitted to the jury called for separate answers on each issue in the case, and by its answers the jury found defendant guilty of the charged violations of the Federal Statute and of the common law of Tennessee. The jury found that 1) UMW had struck Grundy, had induced or encouraged its employees to strike, and had threatened, coerced or restrained Grundy; 2) that an object of such activity was to force Grundy to cease doing

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[1] *UMW* v. *Meadow Creek Coal Co.*, 263 F(2) 52 (CA 6, 1959), *cert. denied*, 359 U.S. 1013 (1959); *UMW* v. *Osborne Mining Co.*, 279 F(2) 716 (CA 6, 1960), *cert. denied*, 364 U.S. 881 (1960); *Gilchrist* v. *UMW*, 290 F(2) 36 (CA 6, 1961), *cert. denied*, 368 U.S. 875 (1961); *Flame Coal Co.* v. *UMW*, 303 F(2) 39 (CA 6, 1962), *cert. denied*, 371 U.S. 891 (1962); *Sunfire Coal Co.* v. *UMW*, 313 F(2) 108 (CA 6, 1963), *cert. denied*, 375 U.S. 924 (1963); *White Oak Coal Co.* v. *UMW*, 318 F(2) 591 (CA 6, 1963), *cert. denied*, 375 U.S. 966 (1964); *Allen* v. *UMW*, 319 F(2) 594 (CA 6, 1963); *Price* v. *UMW*, 336 F(2) 771 (CA 6, 1964), *cert. denied*, 33 U.S.L. Week 3286 (U.S. March 1, 1965) (No. 791).

business with Gibbs as to his trucking and employment contracts; 3) that such activity was not aimed at Grundy in a primary capacity; 4) that Grundy was engaged in commerce or an industry affecting commerce; 5, 6, 7) that UMW was party to a conspiracy to wrongfully interfere with Gibbs' contracts in violation of Tennessee law; 8, 9) that Gibbs suffered $60,000 damages with respect to his employment contract, and $14,500 damages as to the trucking con-
[fol. 525b] tract; 10, 11) that Gibbs was entitled to recover $100,000 punitive damages. Upon the basis of the foregoing findings, the District Judge made the following rulings in disposing of defendant's motions for judgment n.o.v. or for a new trial:

1) That the loss of Gibbs' hauling contract was caused by a secondary boycott as well as by a common law conspiracy, but that the jury's award of $14,500 damages for such loss must be set aside since as a matter of law his proofs as to loss of profits had no probative value. This latter ruling is the subject of Gibbs' cross-appeal in No. 15,625.

2) That interference with Gibbs' contract of employment as mine superintendent was not a secondary boycott because in his status as an employee he could not be "any other person" vis-a-vis the Grundy Mining Company as that term is used in 29 U.S.C.A. § 158(b)(4)(B). That this follows from *Seeley* v. *Brotherhood of Painters,* 308 F(2) 52, 60 (CA 5, 1962) where the Court, dealing with a discharged employee's reliance on that Section, said

"It is the appellant-plaintiff's contention that the labor organization caused his injury by 'forcing or requiring *any person* . . . to cease doing business with *any other person* . . . ,' that is, by requiring his employers, Wiscombe Southern and Earl Paint Corporation, to discharge the plaintiff. We are cited to no case where the language 'to cease doing business with any other person' as used in this section has the same meaning

as to discharge an employee. Literally, it could have that meaning but that would be foreign to the whole purpose of the section which has to do with a secondary boycott ban. No secondary boycott was involved in this case."

3) That even though Gibbs could not rely on the Federal secondary boycott statute to recover for loss of his employment contract, defendant's conduct did permit recovery for such loss under the common law of Tennessee; that because Federal jurisdiction was properly invoked as to Gibbs' claim for loss of his hauling contract it was proper to allow recovery under state law for the loss of his employment contract under the doctrine of *Hurn* v. *Oursler,* 289 U.S. 238, 77 L.Ed. 1148 [fol. 526] (1933), and under this Court's decision in *UMW* v. *Meadow Creek Coal Co.,* 263 F(2) 52 (CA 6, 1959), *cert. denied,* 359 U.S. 1013 (1959) and cases following *Meadow Creek.*

4) That improper argument by plaintiff's counsel did not vitiate the entire verdict, and should be considered only in apprasing its claimed excessiveness.

5) That the $60,000 award for loss of Gibbs' employment contract was excessive by $30,000, the $100,000 award of punitive damages was excessive by $55,000, and that a new trial must be granted unless plaintiff remit such excessive parts of the awards.

The required remittiturs were accepted by plaintiff, and final judgment was entered in total amount of $75,000.

Turning to the factual background of these rulings, plaintiff Paul Gibbs had been engaged in the coal mining industry for many years, presumably as a miner, as a trucker and trucking contractor, and as a mine operator. In 1959 and 1960, two companies, Tennessee Consolidated Coal Company, referred to herein as Tennessee Consolidated, and Tennessee Products and Chemical Corporation, referred to herein as Tennessee Products, owned and were producing

coal in the area in question. Gibbs had been working as a trucker and, as lessee of Tennessee Products, as a mine operator under contract with UMW. Tennessee Consolidated had had contracts with UMW, but after unsuccessful negotiations it terminated such contracts in early 1960 and its operations in what was known as the Coal Valley Mine were shut down by a strike. Prior to August, 1960, Tennessee Consolidated organized a subsidiary called Grundy Mining Company for the purpose of commencing operations in its Gray's Creek holdings. It sought to carry on this operation without a UMW contract, and to that end a number of employees were recruited without notice to former Coal Valley Mine workers, members of UMW. Notice of the new operation, however, was communicated in some manner to one John D. Cain, Jr., a representative of the rival Southern Labor Union. Grundy's president contacted plaintiff Gibbs on August 12, 1960 and they made a verbal contract whereby Gibbs was to be superintendent of the work at Gray's Creek at a starting salary of $600 per month and, as an independent operator, was to furnish trucks and haul the coal produced at Gray's Creek for a price of seventy-eight cents per ton.

[fol. 527] The Gray's Creek area was within UMW District 19, whose representative there was one George Gilbert. More particularly, Gray's Creek was within the jurisdiction of defendant's Local No. 5881, whose members had worked at the Tennessee Consolidated Coal Valley Mine. The plan to open up Gray's Creek became known and on Sunday, August 14, pursuant to a posted notice and the call of their president, members of Local No. 5881 met to consider the prospective opening. Monday, August 15, several members of Local No. 5881 went to the entrance of the Gray's Creek work site shortly after Paul Gibbs' arrival there in the early morning. Paul Gibbs, John Cain, representative of the Southern Labor Union, and a number of miners hired to work at the Grundy mine were then and there persuaded not to attempt to commence work. There was evidence that such persuasion was aided by the display of firearms. The

next day, August 16, Gibbs, Cain and a substantial number of miners who had been employed by Grundy again arrived at the mine site. Again, they were persuaded and induced not to go to work. This time, however, the persuasion was more impressive. A crowd estimated at 75 to 125, including members of Local No. 5881 was on hand, a large number carrying various types of firearms. It will be sufficient to say that by display and pointing of guns, by beating Cain and burning his brief case, and by "escorting" Gibbs and Cain out of the area by a motorcade, the Mine Workers effectively induced Grundy's employees not to go to work and prevented Grundy Mining Company from opening the Gray's Creek mine. This threshold success was thereafter made secure by around-the-clock picketing of the entrance to the mine area. Picketing continued for eight or nine months during which Grundy Mining Company made no further effort to open the mine.

The proofs were sketchy as to defendant's responsibility for the described conduct. It was stipulated that defendant would be liable for action taken by District 19 representative Gilbert in the course of his employment. Gilbert and members of the Local testified that Gilbert neither knew of nor inspired the Sunday meeting or the conduct which followed on Monday and Tuesday. Gilbert testified that he was at a meeting at Middlesboro, Kentucky, on the two days of violence and did not learn of the "spontaneous" action of the Local members until Tuesday. He said that he was then advised by his superiors to repair to the mine site [fol. 528] and see to it that the pickets behaved thereafter. It is clear that after the initial success of the violence, the fruits thereof were made secure by picketing which was approved by and was under the control of District 19; UMW subsistence payments were made to the picketers as well as to other unemployed mine workers.

In support of his contention that the UMW through its representative Gilbert knew of and probably inspired the Local's conduct, and that he, Gibbs, was personally the primary target of the described activities, Gibbs offered a miscellany of proofs. He testified that "to the best of my

knowledge" he saw Gilbert's car at the scene of the events of August 15 or August 16 and that "I'm thinking that I seen Mr. Gilbert drive up there," although Gibbs also stated that "he [Gilbert] didn't play any part that I seen"; that on August 18 he called Gilbert to inquire why he hadn't shown up for an arranged meeting with Gibbs and asked Gilbert what he wanted of Gibbs, and Gilbert replied, "I want you to keep your damn hands off of that Gray's Creek area over there and tell that Southern Labor Union that we don't intend for you to work that mine." Gilbert's attitude toward Gibbs was further portrayed by his statements to another that, "Hell, we can't let that go on," and that "Paul was trying to bring the other union in there, and he [Gilbert] said he ain't going to get by with it." A third witness reported Gilbert as saying, "Paul was trying to bring the Southern Labor Union into the coal fields," and "he said the union wouldn't let him do it," and "they had ways of preventing him from doing it . . . he seemed to think Gibbs was going to have to go," and "he said he had friends in high places that could move him out from the mining business." Further evidence of a purpose to impede Gibbs' continued pursuit of the mining business was furnished by proof that within a week or so after the violence of August 15 or 16, a sack was burned at the mouth of another mine then being operated by Gibbs under a lease with another owner; that the smoke from such a burning would suffocate workers in the mine if they stayed there long enough, and that the belt on an exhaust fan had been cut several times. There was no proof directly connecting any member of defendant union with this activity.

Some evidence was also offered to show that overt threats or acts of violence were not limited to August 15 and 16. There was proof that on one occasion during the continued [fol. 529] picketing of the Gray's Creek mine a visitor to the area observed a rifle against a log at the side of the road near a tent presumably used by the pickets. George Gilbert was among the group of men there present and told the visitor that he could not go down the Pocket Road (near

the Gray's Creek mine site) but suggested another route to the visitor's destination along which he would observe some of Gilbert's men, whom he was to tell that Gilbert said it was all right to pass. Further evidence of the union's purpose to use force to keep Grundy from operating the mine was provided by proofs that on August 17 or 18, after Gilbert presumably took charge of affairs, a crowd of about 100 to 125 men, some recognized as members of the UMW, gathered near the office of Tennessee Consolidated Coal Company (parent of Grundy Mining) at Palmer, Tennessee. Two officers of the company were harassed by the crowd, some of whom were carrying guns. One of the company officers was manhandled and cursed, and one of the crowd "put a 30-30 carbine on" him as he was getting into his car.

There was evidence that after the events of August 15 and 16, Gibbs was unable to get haulage contracts with various operators, including some for whom he had hauled before. Ultimately he lost some of his trucks. He was also unsuccessful in getting employment as a mine superintendent and in due time leases that he had had with the Tennessee Products & Chemical Company were cancelled. Some time in 1961, Tennessee Consolidated made a contract with the Chicago firm of Allen & Garcia. This firm entered into a contract with the UMW, reopened and operated the Coal Valley Mine and then in July, 1962, started extensive operations in the Gray's Creek area. It was shown that Gray's Creek was one of the best coal areas in the region and that it had been contemplated that eventually Grundy Mining was to have opened around ten mines there. Grundy soon took over from Allen & Garcia and these plans were substantially accomplished. An official of the Tennessee Consolidated Coal Company testified that after the Gray's Creek area was finally opened, Paul Gibbs was not hired because "Had I hired Mr. Paul Gibbs none of these mines would be open today"; that they would be closed by "the members of the United Mine Workers of the area." The truth of most of the foregoing testimony was challenged by defendant's contrary proofs but resolution of the factual issue

[fol. 530] made was for the jury, if the case was properly submitted to it. We hold that it was.

1) *Was there evidence of a secondary boycott?*

Appellant UMW contends that the activities described constituted a single primary strike at the premises of Grundy Mining Company to force the hiring of UMW members. The jury, however, found that an object of the defendant's activities was to force the Grundy Mining Company to cease doing business with Gibbs with respect to his contract of employment and his hauling contract. It also found that the union's activity was not a primary strike or primary picketing of Grundy Mining Company. The District Judge set aside the jury's finding of a secondary boycott as to Gibbs' employment contract for the reasons noted above, but sustained its finding of a secondary boycott as to his hauling contract. For the reasons outlined below, we find it unnecessary to determine whether Gibbs ultimately proved the existence of illegal secondary boycott pressure as to either contract. We share the District Judge's view that "the statement in the *Electrical Workers* case [*Local 761, IUE* v. *NLRB,* 366 U.S. 667, 673 (1961)] that 'the distinction between legitimate "primary activity" and banned "secondary activity" . . . does not present a glaringly bright light' is an effective understatement of the complex and vague wording of the sections of the Act here involved." Certainly here it is difficult to separate the "primary" from the "secondary" and to demonstrate with complete assurance the duality of defendant's objectives. If solution of the problem is a matter of factfinding, the jury's verdict would foreclose further inquiry. But if the answers must be found in a conclusion of law, we are at least satisfied that the federal questions presented by plaintiff's pleadings and proofs were not so "plainly unsubstantial" as to destroy federal jurisdiction. Once District Court jurisdiction had thus attached, the doctrine of *Hurn* v. *Oursler,* 289 U.S. 238, 77 L. Ed. 1148 (1933) permitted the jury to consider whether the same facts claimed to make out a case

of secondary boycott did not also prove that a Tennessee common-law tort had been committed by the defendant. The jury's express determination that such a tort had indeed been committed is sufficient to sustain its award of damages, so we find no need to review its determination of the secondary boycott claims.

[fol. 531] Our present application of the doctrine of pendent jurisdiction is not novel. In *Hurn* v. *Oursler*, Mr. Justice Sutherland quoted from *Siler* v. *Louisville & N.R.R.*, 213 U.S. 175, 191, 53 L. Ed. 753, 757 (1909), where the Court ruled that once federal question jurisdiction had been acquired the circuit court "had the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or *even if it omitted to decide them at all, but decided the case on local or state questions only.*" (Emphasis supplied.) *UMW* v. *Meadow Creek Coal Co.*, 263 F (2) 52 (CA 6, 1959), *cert. denied*, 359 U.S. 1013 (1959) applied this theory in a case where, as here, the same conduct was claimed to constitute both a secondary boycott and a conspiracy prohibited by Tennessee common law. There the UMW argued that "the trial court having in effect held that there was no violation of the Federal Act, had no jurisdiction to determine and decide the common law or non-federal cause of action." 263 F(2) 59. We upheld federal jurisdiction to grant relief under state law, however, observing that "the claim of secondary boycott and unlawful conspiracy are not separate causes of action, but merely different grounds to support a single cause of action." 263 F(2) 60. We have continued to apply the rule of pendent jurisdiction, most recently in *Price* v. *UMW*, 336 F(2) 771, 775 (CA 6, 1964), *cert. denied*, 33 U.S.L. Week 3286 (U.S. March 1, 1965) (No. 791), and we are pointed to no persuasive reason for refusing to apply it here.

We are satisfied that plaintiff's evidence clearly made out a case for the jury upon the claim of common-law tort. The jury's answer to the interrogatory in this regard is independent of the secondary boycott finding and is sufficient to sustain the damage award.

2) *Did federal preemption foreclose action under the state common law?*

Appellant next argues that even assuming that jurisdiction to determine a state claim for interference with Gibbs' contracts would otherwise exist, federal law has preempted the existence of any such claim. Primary reliance is placed on *Local 20, Teamsters Union* v. *Morton,* 377 U.S. 252 (1964), reversing our decision in *Morton* v. *Local 20, Teamsters Union,* 320 F(2) 505 (CA 6, 1963). We disagree with this argument. The *Morton* case decided only that where a [fol. 532] state claim arising from a labor dispute did not rely on violence as part of the charged tortious conduct, it could not be prosecuted independently of, or pendent to, an action under the Federal Act. In *Morton* there was no charge of violence to support the state common-law action. It had been held in *San Diego Bldg. Trades Council* v. *Garmon,* 359 U.S. 236, 247 (1959) that absent violence, state common-law actions for torts arising from conduct arguably protected or prohibited by the National Labor Relations Act were preempted by the superior Federal interest. The Supreme Court, however, noted that,

> "we have allowed the States to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order. *United Automobile Workers* v. *Russell,* 356 U.S. 634; *United Construction Workers* v. *Laburnum Corp.,* 347 U.S. 656. . . ."

In our decision in *Price* v. *United Mine Workers, supra,* we noted the inapplicability of *Morton* where "unlawful acts of force and violence" are involved.

Appellant argues, however, that the UMW did not authorize or know of the violence of August 15 and 16 engaged in by members of its Local, and in any event that there is no way to distinguish damages flowing immediately from the initial violence and those which may have come to Gibbs from the subsequent eight months of picketing which effec-

tively and permanently took away the benefits of his contracts with Grundy Mining Company. Wholly apart from our view that there was circumstantial evidence from which the jury could find that District 19's representative Gilbert had a part in arranging the events of August 15 and 16, we gain the impression that the threat of violence remained throughout the succeeding days and months. The night and day picketing that followed its spectacular beginning was but a guaranty and warning that like treatment would be accorded further attempts to open the Gray's Creek area. The aura of violence remained to enhance the effectiveness of the picketing. Certainly there is a threat of violence when the man who has just knocked me down my front steps continues to stand guard at my front door.

Whether it be inferred that defendant UMW through its agents had a hand in planning and carrying out the original [fol. 533] violence, whether they ratified the violent conduct by using it to make effective the subsequent so-called peaceful picketing, or whether the violent character continued as a threat throughout the entire picketing, we believe that violence was part of the common-law tort involved, and action therefor was saved from preemption by the rule of *San Diego Bldg. Trades Council* v. *Garmon, supra; United Automobile Workers* v. *Russell, supra; United Construction Workers* v. *Laburnum Corp., supra.*

3) *Improper argument to jury.*

The UMW contends that in all events a new trial should have been awarded because of improper argument to the jury. The District Court conditionally denied the motion for new trial, ruling that,

> ". . . the argument was improper. While an advocate may share his client's prejudices against an adversary, he cannot properly share them with the jury, particularly when they do not relate to any matters in evidence. However, the Court is of the opinion that the argument was not so prejudicial as to warrant a new trial,

> but should rather be taken into consideration by the Court upon the issue of excessiveness of the verdict."

Finding the verdict of compensatory damages for loss of Gibbs' employment contract excessive by $30,000, and the verdict of punitive damages excessive by $55,000, denial of a new trial was conditioned upon accceptance of a remittitur in those amounts. Gibbs accepted the remittitur.

It is now argued that "the District Court clearly found that the argument did prejudice United Mine Workers rights, and that such a finding absolutely requires a new trial." It is the law that where an excessive verdict results from appeals to passion, prejudice, or caprice, a remittitur may not be employed to cure the error. *Minneapolis, St. P. & S.S.M. Ry.* v. *Moquin,* 283 U.S. 520, 75 L. Ed. 1243 (1931); *Ford Motor Co.* v. *Mahone,* 205 F(2) 267 (CA 4, 1953); *Brabham* v. *Mississippi ex rel. Smith,* 96 F(2) 210 (CA 5, 1938), *cert. denied,* 305 U.S. 636, 83 L. Ed. 409 (1938). We so held in *National Surety Co.* v. *Jean,* 61 F(2) 197 (CA 6, 1932).

Defendant's motion for a new trial charged that the jury's verdict was the result of passion, prejudice or caprice. [fol. 534] Though thus challenged to do so, the District Judge did not find that the verdict was so infected. The District Judge found that counsel's argument was improper but we do not believe his statement that it was "not so prejudicial as to warrant a new trial" should be construed as expressing by negative implication a finding that the verdict was the product of passion, prejudice or caprice. The heart of his finding rather is revealed in his statement that the impropriety of the argument was "to be taken into consideration . . . upon the issue of excessiveness of the verdict." The peculiar nature of many of the remarks leads us to conclude that he found the remarks to fall within a very narrow category calculated to influence the size of a favorable verdict without affecting the determination on the merits. These remarks are set out in full in the margin to demonstrate why we have come to this conclusion, and why

we find ourselves unable to disagree with the court's finding.[2] This finding distinguishes this case from the cases cited above where the trial judges had found the verdicts to be products of passion, and moves it into the traditional [fol. 535] area where a remittitur may be employed to avoid an excessive verdict without resort to a new trial. Thus viewed, we do not find an abuse of discretion in the District Judge's action.

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[2] Counsel's remarks include the following:

"Now, what they are doing is what I call legal warfare. They will do what they please, the law doesn't mean (snaps fingers) that to them . . . And as Mr. Kramer told you, if you finally get down to damages, if it is not too much we'll pay it off and do it again. So what. If it is too much we will appeal it and stall a few years. Now, that is the way they work."

"Now, this poverty in the coal field that Mr. Kramer was talking about . . . We've got coal, and we've got men who want to work and mine coal. Now, who is the bugger? The bugger is the United Mine Workers of America, for the simple reason that they are going to pass work on their terms or else. And if a few people starve in the midst, what difference does that make . . ."

". . . in addition even if you awarded $100,000 [plaintiff's requested punitive damages] they would chuckle in their sleeves and walk out of this courtroom and laugh. They will pay off the $100,000 and say oh, well, so what. We've got mixed up, it cost us this much, now let's go back and do the same thing again. I give you my word that that is exactly what this Union is counting on. It's the same thing as a fellow that has been caught nine times driving while drunk, and every time he has been brought up they have fined him $1.00. As soon as he got out of the courtroom he would go get him another drink, and that is just exactly what this union is counting on here."

"Now, we believe that all of those elements taken together . . . adequately sustain a compensatory award of $250,000. Now, that sounds like a lot of money, but let me point out to you, look who you are dealing with, too. Don't overlook it. The International Union of the Mine Workers of America . . . Certainly, they want you to be light on them, so they can pay it back and go over there and blow up another mine, or conduct similar activities."

4) *Plaintiff's cross-appeal.*

By his cross-appeal, No. 15,625, plaintiff Gibbs challenges the District Judge's action in setting aside the jury award of $14,500 damages for interference with his contract to haul coal. The District Judge found that there was not probative evidence to support plaintiff's own $14,029.28 estimate of his lost profits and that such estimate was "admittedly based upon carrying loads in excess of the permissible weight limits . . . under the laws of Tennessee." We agree with the District Judge.

Plaintiff's estimate of his lost profits rests on unwarranted assumptions. Using the contract price of seventy-eight cents per ton, he calculated at $27,300 the income from hauling 35,000 tons of coal under a contract for sale to the Redstone Arsenal. Expenses of hauling were then calculated at $13,270.72 *on the assumption* that the five proposed Gray's Creek mines would be producing 10,000 tons per week, although that assumption was based only on plaintiff's "about 30 years experience that I've had in coal mining." Since under this assumption the 35,000 tons of coal could be hauled in three and one-half weeks, the expense figure included wages, repairs, workmen's compensation insurance, truck insurance, payroll taxes, truck tags, telephone, and depreciation costs for only that length of time. Gibbs himself admitted at trial that he could not have delivered the coal in three and one-half weeks if production were at less than 10,000 tons per week. His production estimate is weakened on its face by his failure to attempt reasoned explanation of the figure chosen, by his implied admission that he did not really know what kind of equipment would have been available at the new mine sites, and by his assumption that he could have got the five mines up to a production of 2,000 tons per week each within the space of two weeks. Paul B. Callis, president of Tennessee Consolidated Coal and its subsidiary, Grundy Mining Company, provided testimony weakening the estimate much further by his statement that it had not been decided whether to open five mines at Gray's Creek or only two—"the basic plan was to

open two mines to produce approximately 600 tons in each, [fol. 536] per day. . . . " Callis also estimated that it would take between six months and one year to get these two mines into full production.

The test which the Tennessee courts would apply in testing the sufficiency of evidence of lost profits under circumstances like those involved here is spelled out in *Anderson-Gregory Co.* v. *Lea,* 51 Tenn. App. 612, 620, 370 SW(2) 934 (1963):

> ". . . when a contract though of some magnitude is informal, and . . . is not within the Statute of Frauds because it is a contract for labor, and nothing has been produced under such a contract but only preparation to produce has been made, . . . only in a clear case, where the proof of profits is devoid of any element of speculation and shows all proper means taken to minimize loss should a recovery be allowed for prospective profits."

Plaintiff's only proof of loss was his estimate based on the expenses of three and one-half weeks' operations. Such assumption as to production is too speculative to justify submission of such evidence to the jury. Any possibility of doubt, however, is removed by reviewing the finding of illegality in the proposed operations.

Without going into detail, it is clear that Gibbs' statement of the manner in which he proposed to perform his hauling contract involved violation of the existing laws limiting axle weights. We agree with the District Judge's conclusion that estimates of profits based on proposed violation of state axle-weight laws are of no probative value.

> "Loss of profits may not be considered as an element of damages, where the business from which they would have resulted was, or would have been, conducted in violation of law."

17 C.J. *Damages* § 119. See also 25 C.J.S. *Damages,* § 42b, p. 519; 15 Am. Jur. *Damages* § 157, p. 575; Annot., 52 L.R.A.

33, 66 (1913). The District Judge correctly relied on *Shelley* v. *Hart*, 112 Cal. App. 231, 297 Pac. 82 (1931), for his view that profit estimates which contemplate illegal operations will not support an award, especially where they provide no means of separating the legal from the illegal.

It is impossible to know how Gibbs' estimated profits would have been affected by legal operation instead of il-[fol. 537] legal. When this infirmity is added to an already uncertain showing, it must be agreed that no proper evidence was offered to support the jury verdict.

Judgment affirmed.

[File endorsement omitted]

[fol. 538]

IN UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JUDGMENT—April 6, 1965

Appeal from the United States District Court for the Eastern District of Tennessee.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Tennessee and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Plaintiff-Appellee recover from Defendant-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

Carl W. Reuss, Clerk.

[fol. 539] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 540]

SUPREME COURT OF THE UNITED STATES

No. 243, October Term, 1965

UNITED MINE WORKERS OF AMERICA, Petitioner,

v.

PAUL GIBBS.

ORDER ALLOWING CERTIORARI—October 11, 1965

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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FILED
JUN 10 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 243

UNITED MINE WORKERS OF AMERICA, *Petitioner*

v.

PAUL GIBBS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No.

UNITED MINE WORKERS OF AMERICA, *Petitioner*

v.

PAUL GIBBS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, United Mine Workers of America (called "UMW" herein), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit,[1] entered April 6, 1965, in Case No. 15,624, styled Paul Gibbs, Plaintiff-Appellee v. United Mine Workers of America, De-

[1] Called "Sixth Circuit" herein.

fendant-Appellant, affirming a judgment entered August 28, 1963, by the United States District Court for the Eastern District of Tennessee, Southern Division,[2] against UMW in Gibbs' favor for $75,000 and costs (59-60a).[3]

A certified appendix record in said case, with the proceedings in the Sixth Circuit, is furnished herewith, in accordance with this Court's Rules.

OPINION BELOW

The Sixth Circuit's opinion appears in Appendix A to this Petition (pp. A. 1a-17a); and in the certified appendix record. The opinion is not officially reported but is unofficially reported in 51 CCH Labor Cases 19,623.

The District Court's opinion on UMW's motion to dismiss and on UMW's motion for judgment NOV appear in Appendix A to this Petition at pp. A. 19a-24a and pp. A. 24a-40a); and in the certified appendix record at pp. 24-30a and pp. 42-58a). The opinion on the motion to dismiss is not reported. The opinion on UMW's motion for judgment NOV is reported at 220 F.Supp. 871 and is also reported at 48 CCH Labor Cases 18,473 and 54 Labor Relations Reference Manual 2080.

JURISDICTION

The Sixth Circuit's judgment, for which complaint is herein made, was entered April 6, 1965. This Court's jurisdiction is invoked under 28 USCA § 1254(1) and 2101(c).

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[2] Called "District Court" herein.

[3] Page references are to the certified Appendix Record filed in this Court's Clerk's office under Rule 21. References to the Appendix to this Petition are indicated by the symbol "A".

BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

The jurisdiction of the District Court was based upon Section 303 of the Labor Management Relations Act, 1947, as amended,[4] (29 USCA 187) and upon the theory of pendent jurisdiction under which it was found that the District Court had jurisdiction to determine Gibbs' alleged state law cause of action for wrongful interference with his contractual rights.

QUESTIONS PRESENTED

1. Where a parent union assumes the direction of picketing theretofore commenced by a local union and insists upon and achieves order, is the parent union liable under state law for violence committed prior to the parent union's involvement?

2. Where an appeal to prejudice in jury argument on matters unrelated to the evidence was found to have materially affected the verdict, was it proper, in light of the indiscriminate and extensive nature of the appeal to prejudice, to cure the verdict by remittitur rather than a new trial, on the theory that the appeal to prejudice was "calculated to influence the size of a favorable verdict (for the plaintiff) without affecting the determination on the merits"?

3. In an action for damages against a labor union in which plaintiff alleged that acts which occurred during a labor dispute constituted a violation of Section 303 of the Act and a violation of state law, did the District Court have pendent jurisdiction of the non-federal claim?

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[4] Herein called "Act."

4. Where a verdict of damages is based upon a finding of liability under Section 303 of the Act and state common law and where damages recoverable under the two theories are not necessarily the same and it is impossible to ascertain to what extent the jury relied on one theory or the other in assessing the award of damages, and where it is found that the action was erroneously submitted to the jury on the Section 303 claim, may the verdict be upheld on the sole basis of the common law claim?

STATUTES INVOLVED

The statutory provisions involved are Section 6, Norris-LaGuardia Act (29 USCA 106); the Labor Management Relations Act, 1947 [29 USCA 158(a)(2), 158(b)(4) and 187]. These statutory provisions are set forth in Appendix B hereto.

STATEMENT OF THE CASE

Kind of Action and The Judgment

Paul Gibbs, a coal company superintendent and also an independent contractor trucking coal for the company, sued UMW for damages he allegedly sustained in each capacity, charging a violation of Section 303 and state law in a 1960 dispute (14-14a, 23a, 30a). UMW moved to dismiss on jurisdictional grounds (20a, 23a), but its motion was overruled (24-30a). UMW then answered (15-17a), and the case was tried to a jury on special issues. The jury found UMW had violated *both* Section 303 and state law and that Gibbs had sustained compensatory damages of $60,000.00 as a supervisor and $14,500.00 as an independent trucker. The jury also awarded $100,000.00 in punitive damages (32-34a).

Upon consideration of UMW's motion for judgment NOV or for a new trial (34-41a) the District Court held that Gibbs could not recover under Section 303 for his claim as a supervisor, as a matter of law; that it had pendent jurisdiction of the state law claim; that evidence sustained the verdict of liability under state law, and, with respect to Gibbs' claim as a trucker, under Section 303; but that there was no evidence to sustain the verdict of $14,500.00 in damages to Gibbs as an independent trucker. The District Court also found the jury argument of plaintiff's counsel was improper but that it could be cured by a remittitur. A remittitur of $30,000.00 was suggested with regard to damages claimed by Gibbs as a supervisor and of $55,000.00 in the award of punitive damages (42-58a). The suggested remittitur was accepted and judgment was entered for a total of $75,000.00 (59-60a).

Upon appeal the Sixth Circuit affirmed the judgment as entered. (p. A. 18a) The substance of the Sixth Circuit's opinion is discussed below (pp. 8-11, *infra*).

STATEMENT OF FACTS

For many years Tennessee Consolidated Coal Company ("Consolidated") operated a major coal mine ("Coal Valley") in Southern Tennessee under union contracts with UMW. Effective in March of 1960 Consolidated cancelled its union contract and its employees, members of UMW Local 5881, refused to work (90-96a, 319a). In the summer of 1960 Consolidated organized a wholly owned subsidiary, Grundy Mining Company ("Grundy"), to open and operate a number of small mines on its Grays Creek coal lands near the Coal Valley Mine, to supply coal on Consolidated's contracts (193-195a).

At that time Gibbs was operating a small mine in the area under UMW contract, and was also engaged in the business of trucking coal. Prior to the incidents described below he had no business relationship with Consolidated or Grundy (89-94a, 135-139a).

On August 12, 1960, Gibbs was employed by Grundy to superintend the opening of the Gray's Creek mines. He was also employed as an independent contractor to truck the coal to be mined. Gibbs was told that employees would be hired and would meet him at Gray's Creek on the following Monday, August 15, 1960. He understood that UMW members who had worked at Consolidated's Coal Valley mine would not be employed. Following Gibbs' employment, Grundy, with the assistance of the Southern Labor Union, began to recruit employees (92-100a, 141-143a, 175a, 179a, 183a, 185a).

These developments were unknown to UMW and its members. On Saturday, August 13, however, news that mining was to commence at Grays Creek reached the Coal Valley miners. UMW Local 5881 called a meeting of its members for Sunday, August 14, at which the subject was discussed. No representative of either the International Union or District 19 attended or was notified of the meeting. George Gilbert, District 19's area representative, was absent from the area from Saturday, August 13, until the following Tuesday night, August 16, attending a meeting at District 19's headquarters in Middlesboro, Kentucky (326-328a, 337a, 350-352a, 395a, 416-417a, 430-431a, 457a).

On Monday, August 15, Gibbs went to the proposed mine site. Three members of Local 5881 also went there and talked to Gibbs. Gibbs soon left though he had had

no argument or disagreement with these men. Later, while Gibbs was not present, some of the recruited employees came to the mine site. They testified they were stopped from "going in" by "four to eight men", some of whom were armed (99-101a, 151a, 395-398a, 417-418a).

On August 16 a large number of Coal Valley miners were present at the Grays Creek entrance. A few of the recruited employees came but were forceably persuaded to leave (164-167a, 172-174a, 181-182a). Later Gibbs came and was threatened, though not harmed, by the miners. Johnny Cain, the Southern Labor Union organizer who had aided Grundy in the recruitment, also came and was beaten up (103-109a, 140-141a, 152-154a, 441-444a, 458-459a).

News of the effort to open mines in Grays Creek (though not of the disturbance) was telephoned to a District 19 official in Middlesboro on Tuesday morning, August 16. He gave the information to District Representative Gilbert with instructions to investigate and report back, to keep the pickets few in number if there was picketing, and to make certain the picketing did not result in the shut down of other area mines. Gilbert returned to his home near the mine that afternoon (298-301a, 310-311a, 327-329a, 337a, 352-353a, 472-473a).

After his return Gilbert instructed the men to limit their pickets to three and maintain order (332-334a, 408-409a, 424-433a, 461-462a). Other District officials were sent to the area to keep down the trouble (473-477a). The evidence is positive that after Gilbert's return, there was no disturbance of any kind on the picket line. At the instructions of Gilbert the pickets were limited to three (384a, 405-406a, 424-425a, 433-434a, 444a).

The picketing was in protest of the effort of Consolidated through its subsidiary, Grundy, to replace in effect, its long time employees with persons specially recruited by a rival union. The Coal Valley miners had been promised by Consolidated officials that their next work was to have been in Grays Creek (435a-445a, 460-461a, 384a, 387a, 394a, 402a, 437a, 475-477a). The picketing continued through May, 1961, when the old Coal Valley mine was reopened under a UMW contract. Grundy, meanwhile, had made no further effort to open mines in Grays Creek (237-239a, 305-307a, 332-333a, 382-383a, 473-474a).

Additional aspects of the evidence are discussed in the following section of this petition.

THE DECISION OF THE COURT OF APPEALS

The four issues material to this petition were decided by the Sixth Circuit as follows:

(1) It found the District Court properly applied the doctrine of pendent jurdisdiction

In so doing the Sixth Circuit continued to apply a rule it has found applicable in a number of cases involving the present petitioner in which substantial judgments under state law have been sustained.

In the instant case the Court stated that two requirements must be met in order to sustain the exercise of jurisdiction by a federal court over a state law claim wherein a complaint recovery is sought under Section 303 and state law: (a) The federal questions presented by plaintiff's pleadings and proofs must not be "plainly unsubstantial"; and (b) the same conduct (or at least substantially the same conduct) must be claimed as the basis for the claim under both federal and state law.

The Sixth Circuit found both requirements satisfied. UMW contended that the picketing at the Grundy mine was clearly primary and hence outside the scope of Section 303. Gibbs contended, however, that the purpose of the picketing was to force Grundy to cease doing business with him both as a superintendent and as an independent trucker. Without commenting on the *admitted facts* that UMW or its members were without knowledge of Gibbs' trucking contract at the time and thus *could not have had* the intention attributed to them by Gibbs; and that Gibbs at no time sought to commence performance of his trucking contract and UMW had no dispute with Gibbs as a coal operator or as a trucking contractor, and without discussing this Court's definitive rejection in *United Steelworkers* v. *NLRB,* 376 U.S. 492, of Section 303's application in a comparable situation, the Sixth Circuit held that Gibbs' contention relative to UMW's purpose was not "plainly unsubstantial".[5]

(2) It found the violence of August 16 attributable to UMW and, therefore, that Gibbs' claim under state law was not preempted.

Here the Sixth Circuit held there was evidence from which the jury could infer that UMW agents "had a hand in planning and carrying out the original vio-

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[5] On the authority of *Seeley* v. *Brotherhood of Painters,* etc., 308 F.2d 52 (CA 5, 1962), the District Court found, as a matter of law, that a superintendent could not claim that primary picketing of his employer constituted a Section 303 violation as to him. It was thus the implication of the District Court that the substantial federal question had to be found, if at all, with regard to Gibb's claim as an independent trucker (54a).

lence".* *Significantly,* however, it held preemption would not preclude state law application—presumably notwithstanding UMW's successful efforts to maintain an orderly picket line—on the theory that its exercise of control over the pickets after the violence ratified the prior violence and made secure "the fruits" of the initial success of the violence. UMW's admitted involvement subsequent to the violence, the Court concluded, brought the case within the exception to the preemption principal announced in *UAW* v. *Russell,*

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* The inference that UMW was involved in the original violence could be drawn, the Sixth Circuit suggested, from statements attributed to District Representative Gilbert, such as the following: "Paul (Gibbs) was trying to bring the other union in there and he (Gilbert) said he aint going to get by with it." (218-219a).

The Court also pointed to testimony of Gibbs with regard to the identification of union men who were present at Grays Creek on August 15 or 16. Gibbs testified (126a): "Well, everything happened so fast there, I'm thinking that I seen Mr. Gilbert drive up there, but where he went I don't know". Gibbs also said "he (Gilbert) didn't play any part that I seen". Gibbs' testimony is insufficient in law to warrant a verdict based on Gilbert's presence, even disregarding positive contrary evidence and Gilbert's inconsistent pre-trial deposition (479a). Evidence must in itself have fitness to induce conviction, even if uncontradicted. *Standard Oil Co.* v. *Roach,* 21 Tenn. App. 661, 665. Thus, in *May* v. *Railroad,* 129 Tenn. 521, where a witness testified that an incident occurred September 12, according to her best recollection, but she could not be certain, the Tennessee Supreme Court held "there was no evidence to sustain the verdict because . . . the plaintiff was unable to state the date (a pivotal point in the case) any more definitely that it was either on the 12th or near that date".

It is significant that this testimony was not relied upon by the District Court nor by Gibbs in the Court of Appeals and was not discussed in briefs or argument. Indeed, in Gibbs' Main Brief in the Sixth Circuit this admittedly vague recollection or impression was tacitly abandoned with the statement that "undisputably it appears that Gilbert . . . went to Middlesboro . . ." (Gibbs' Main Brief, p. 61).

356 U.S. 634, even if UMW was not the author of the original violence.

(3) It found counsel's appeal to prejudice could be cured by remittitur

In considering this aspect of the Sixth Circuit's decision it is necessary to examine the jury argument of Gibbs' counsel (481-493a). It is replete with assertions calculated to arouse every conceivable prejudice against UMW. It was elaborately asserted that UMW was utterly without respect for the law; that UMW is heartless and cares not that innocent people starve; that its very defense in this case was a scheme to "bludgeon" Gibbs; that it is the "bugger" responsible for poverty in the coal field; and much more. For example, in a case without mention of property destruction, counsel argued (491-492a) ". . . they want you to be light on them so they can pay it back and go over there *and blow up another mine.*"

The Sixth Circuit acknowledged in its opinion that where "an excessive verdict results from appeals to passion, prejudice, or caprice, a remittitur may not be employed to cure the error", citing several cases including *Minneapolis, St.P.&SSMRy.* v. *Moquin*, 283 U.S. 520, and *National Surety Co.* v. *Jean*, 61 F.2d 197 (CA 6, 1932).

It held, however, in agreement with the District Court, that counsel's remarks were such as to be "within a very narrow category calculated to influence the size of a favorable verdict without affecting the determination on the merits." It thus found the case in a "traditional area when a remittitur may be employed to avoid an excessive verdict . . ."

(4) It pretermitted UMW's contention that the verdict for damages, which was based upon two theories, could not be sustained where it was subsequently determined that one theory was erroneous

REASONS FOR GRANTING THE WRIT

Question One

The Sixth Circuit's decision improperly implements the doctrine of federal preemption and, as such, conflicts with decisions of this Court, including *Youngdahl* v. *Rainfair, Inc.*, 355 U.S. 131 (1957), *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), and *Local 20, Teamsters Union* v. *Morton*, 377 U.S. 252 (1964). Moreover, its finding that UMW was liable in damages because it "ratified" prior violent conduct and because it received the "fruits" thereof by reason of its subsequent direction of nonviolent picketing, also conflicts with *Rainfair* and with *UMW* v. *Coronado Coal Company*, 259 U.S. 344.

The question is of obvious importance to organized labor and to national labor policy. A cornerstone of that policy is responsible unionism but it does not and should not extend to impose liability for unauthorized acts of non-agents. Nor should it be extended, as this decision does, to thwart a union's legitimate efforts to curb excessive conduct on the part of those it is the union's duty to represent.

In the instant case UMW, as the Sixth Circuit alternatively viewed the evidence,[7] was faced with the choice of abandoning its members or of restoring order. It did the latter, and from that point on no violence

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[7] We believe the conclusion that UMW is legally responsible for the violence of August 16 must stand or fall on the Sixth Circuit's finding that UMW "adopted" the violence and secured the "fruits" thereof. Its finding of evidence that Gilbert was present at the time cannot stand for the reasons expressed in footnote 6, *ante* p. 10. Furthermore, this conclusion is clearly offensive to the "clear proof" requirement of the Norris-LaGuardia Act's Section 6, 29 USC 106.

occurred. Obviously UMW could not erase what had transpired. This does not mean, however, that by restoring order it "secured the fruits" of or "ratified" the prior violence. Under analogous circumstances the Fifth Circuit held this "does not of itself amount to ratification", *NLRB* v. *Mayer,* 196 F.2d 286 (CA 5, 1952).

To impose liability on the parent union in these circumstances is to require that a union forego its right to picket in an orderly way because of the prior violence of members, or to permit picketing only on penalty of damages under state law.[8] This conclusion conflicts with the *Rainfair* case where it was held that the impact of federal preemption continued notwithstanding the occurrence of disorder in a labor dispute. State law, even in this context, *Rainfair* holds, *may not be applied to enjoin peaceful picketing.* By the same token liability for damages may not be imposed under state law for such conduct. This view, and not that

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[8] The relationship between UMW and the men prior to Gilbert's involvement would not have constituted the men UMW agents, and there is no evidence showing that any of the men were UMW agents. The National Labor Relations Board in *Poinsett Lumber and Mfg. Co.,* 33 LRRM 1101, said, ". . . it is well established that mere advocacy of the [union] by rank-and-file employees does not constitute them agents of the union." In *International Ladies Garment Workers Union* v. *NLRB,* 99 App. D.C. 64, 70, 237 F.2d 545, 551, (1956), the Court held that "Imputation of the acts of one person to another" is forbidden *"except when the one is acting as agent for the other".* Accord: *NLRB* v. *Ohio Calcium Co.,* 133 F.2d 721 (CA 6, 1943). The Fifth Circuit, in *NLRB* v. *Marshall Car Wheel, etc.,* 218 F.2d 409, 417, (CA 5, 1955), rejected a contention that there was an agency relationship "between all strikers, the guilty employees, and the union".

of the Sixth Circuit, comports with the preemption principle of the *Garmon* and *Morton* cases.

We insist that there is nothing in a union's instructions not to engage in violence and not to engage in mass picketing, coupled with the absence thereof, which warrants a finding of "adoption or affirmance . . . of a prior act" as is required to establish ratification. 3 Am. Jur. 2d, Agency, Sec. 160.

UMW had a legitimate reason to involve itself, wholly apart from ratification of the prior violence. Simply to restore order was a sufficient reason. The circumstances under which the company sought to replace UMW members was another. Indeed, the NLRB (though not the Sixth Circuit) sustained UMW's subsequent charge that the coal companies unlawfully assisted Southern Labor Union in their combined efforts to displace UMW members.[9] The doctrine of ratification is therefore inapplicable for "Ratification cannot . . . be inferred from acts which may be readily explained without involving any intention to ratify." 3 Am. Jur. 2d, Agency, Section 170. See also *UMW* v. *Coronado Coal Company,* 259 U.S. 344, *International Ladies Garment Workers* v. *NLRB,* 237 F.2d 545 (CADC, 1956).

The Sixth Circuit's sweeping imposition of liability poses grave questions both of preemption and union responsibility which Court has not had occasion to con-

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[9] UMW charged Tennessee Consolidated with having unlawfully assisted Southern Labor Union in violation of Section 8(a)(2) of the National Labor Relations Act, 29 USC 158(a)(2), in this matter. The NLRB held that Tennessee Consolidated had so violated the Act, 131 NLRB 536, but the Sixth Circuit refused to enforce the Board's order. *NLRB* v. *Tennessee Consolidated Coal Co.,* (CA 6, 1962), 307 F.2d 374.

sider in a comparable context. We submit the question should be settled by this Court.

Question Two

We agree with the District Court and the Sixth Circuit that counsel's appeal to prejudice had a corrosive effect on the jury's verdict. We disagree that its impact was or could be cured by remittitur. We emphatically disagree that the appeal to prejudice was designed to merely enhance the size of the verdict and did not go to the issue of liability. This narrow distinction was neither intended nor achieved, as a reading of counsel's argument and the resulting verdict plainly show (481-493a).

The decision conflicts, by every realistic standard, with that of the Fourth Circuit in *UMW v. Patton,* 211 F.2d 742, 751 (CA 4, 1954). In that case the Court refused to permit a comparable verdict to stand where the inference could "fairly be drawn that the jury may have been influenced in reaching such result by incompetent and prejudicial evidence. . . ."

The conflict is all the more glaring for here it was not merely evidence that achieved the result; it was by a calculated appeal to prejudice in closing argument.

The Sixth Circuit correctly said "that where an excessive verdict results from appeals to passion, prejudice or caprice, a remittitur may not be employed to cure the error." We submit, however, that this legal proposition is devoid of meaning if, as here, its application is to be avoided upon a finding that an appeal to prejudice of the type here involved was merely designed to enlarge the size of the verdict.

This Court is aware that cases of this sort involve one of the most sensitive areas of our economy in which emotion far too often holds sway. In such a case an appeal to prejudice (whatever its purpose) is an especially effective instrument. Its use should be denied —not merely circumscribed—in the most emphatic terms.

The question presented turns on a consideration of fair play and justice. These factors, as well as the noted conflict in decisions, fully warrant the review of this case.

Question Three

Finding that "the federal questions presented by the plaintiff's pleadings and proofs were not 'so plainly unsubstantial' as to destroy federal jurisdiction" and that "the same conduct" constituted the basis for the federal and state claims, the Sixth Circuit held that the doctrine of pendent jurisdiction empowered the District Court to determine the state law claim. UMW submits that this application of the pendent jurisdiction doctrine conflicts with this Court's decisions of *Local 20 Teamsters Union* v. *Morton*, 377 U.S. 252 (1964), and *Hurn* v. *Oursler*, 289 U.S. 238 (1933).

As we view it, this case involves "primary activity" of a singular form. The protest obviously concerned the effort of Grundy Mining Company to replace the UMW members who had worked for its parent corporation for many years. The picketing occurred at the entrance to the proposed Grundy mines. The violence which erupted likewise occurred at the entrance to the mines. Even in Gibbs' capacity as an independent trucker, Gibbs was to perform a part of Grundy's normal work, i.e. the transportation of coal, and hence

under the doctrine of *Local 761 IUE* v. *NLRB,* 366 U.S. 667 (1961), the picketing was secondary as to Gibbs. Moreover, Gibbs could not complain that the violence changed the picketing from a primary to a secondary activity. A contrary conclusion was first reached in *NLRB* v. *International Rice Milling Company,* 341 U.S. 665, (1951), and any lingering doubt was laid to rest by this Court's decision in *United Steelworkers* v. *NLRB,* 376 U.S. 492, (1964).

Other applicable decisions foreclose the possibility that a secondary boycott could exist under the circumstances of this case, as a matter of law. Notable among these decisions is that of *Seeley* v. *Brotherhood of Painters,* 308 F.2d 52, (CA 5, 1962). In this case it was held that primary picketing of an employer could not constitute a secondary boycott as to that employer's supervisor even though the picketing had as its purpose the removal of the supervisor. Moreover, in conflict with the decision of the Sixth Circuit, *Seeley* held that the alleged federal claim did not invest the Court with pendent jurisdiction to determine state claims arising out of the same circumstances.

The decisions cited establish that the federal question posed by the instant case was "plainly unsubstantial". Even, therefore, if the pendent jurisdiction doctrine may be applicable in certain cases, its exercise was error in the instant case under this Court's decision in *Levering & Garrigues Co.* v. *Morrin,* 289 U.S. 103.[10]

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[10] Gibbs contended that an object of the picketing was to force Grundy Mining Company to cease doing business with Gibbs with respect to his contract of employment and his hauling contract. The jury agreed with this contention, notwithstanding the evidence, detailed above, that the purpose of the picketing was to

Furthermore, it was erorr to find a substantial federal question inasmuch as the UMW members who engaged in picketing were without knowledge of Gibbs' contract as a trucker. Gibbs never undertook to perform on his trucking contract and hence none of his trucking employees were remotely involved in the dispute. In the absence of the involvement of secondary employees it is idle to say that a substantial federal question under Section 303 is posed. And because UMW was without knowledge of Gibbs' trucking contract, it was impossible for UMW to have had the intent or specific objective required in a Section 303 violation. *Local 1976, United Brotherhood of Carpenters* v. *NLRB,* 357 U.S. 93, 98.

Even had a substantial federal question been posed, the facts upon which Gibbs based his claim of secondary boycott as a trucker were necessarily different from those involved in his claim under the common law as a supervisor. Because of the differences in the facts supporting the two claims it was error to apply the pendent jurisdiction doctrine.

Insofar as we are aware the Sixth Circuit is alone in its application of the pendent jurisdiction doctrine in labor cases. This Court reversed the Sixth Circuit's

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protest Grundy's replacement of its longtime coal miners with Southern Labor Union members. In conflict with the jury's conclusion is the decision of the National Labor Relations Board on charges against UMW's Local 5881, growing out of this same dispute, 130 NLRB 1181. In any event, it is beyond any doubt that both Gibbs and Grundy had the situs of their work at the Grundy mine. Picketing at that location therefore, under the Board's long-accepted standards, would not constitute a proscribed secondary boycott. *Sailors' Union of the Pacific* (*Moore Dry Dock Co.),* 92 NLRB 547. See also a discussion of Board opinions in *Local Union 761, IUE* v. *NLRB,* 366 U.S. 667.

application of that doctrine in the *Morton* case in which non-violent picketing was involved. It is significant also that the Fifth Circiut rejected its use in the *Seeley* case, *supra,* as did the Fourth Circuit in *UMWA* v. *Patton,* 211 F.2d 742.

Considered alone or with the serious question presented with regard to UMW's involvement in the violence of August 15-16, and in light of the inconsistent application by the three Courts of Appeals which have had occasion to consider the question in labor controversies, the importance of this jurisdictional issue can hardly be denied. UMW submits that a writ of certiorari should be granted to the end that this question may be settled.

Question Four

An important question raised by UMW on its appeal was not answered by the Sixth Circuit.

It will be recalled that the jury's verdict for damages for the loss of employment as a supervisor was based upon a finding of liability under both federal and state law. The District Court set aside finding of liability under Section 303 but nevertheless, upon acceptance of the suggested remittitur, entered judgment on the verdict.

UMW insisted that inasmuch as one of the two theories on which the verdict may have rested was erroneous, the error could be cured only by setting aside the entire verdict and granting a new trial. The Sixth Circuit's affirmance of the judgment, notwithstanding, conflicts with this Court's decision in *Sunkist Growers* v. *Winckler & Smith Co.*, 370 U.S. 19. It also conflicts with that of the Eighth Circuit in *Local 978, United Brotherhood of Carpenters* v. *Markwell,* 305 F.2d 38

(1962) and *Lessig* v. *Tidewater Oil Company,* 327 F.2d 459 (CA 9, 1964).

Insofar as damages for loss of employment is concerned the verdict was general in nature (See Issue 8 of the verdict form—33a) for it combined the consequences of both federal and state law theories of liability. With the removal of one of the theories of liability it became impossible to determine which theory—or to what extent each theory prompted the verdict on the damage issue. The jury was told the distinction in the measure of damages applicable to the two claims. Thus in explaining the secondary boycott claim the District Court pointed out that "if the object of the activity was unlawful, the fact that only peaceful means were employed does not protect those responsible for liability under the act"; whereas "with regard to the alleged wrongful interference, as distinguished from the alleged secondary boycott, it is the lawfulness of the means rather than the lawfulness of the object or the purpose of the picketing that is controlling" (502a, 506a). Under the charge, therefore, the jury could have considered all of the picketing secondary, and only the events of the first two days as violative of state law, and have assessed its $60,000.000 in damages because of the combined liability.

Because of the positive conflict with the cases cited above and the significance of the Sixth Circuit's decision in this regard in implementing Section 303 of the Act, we believe this question should be reviewed.

CONCLUSION

Petitioner prays that this petition for writ of certiorari be granted and that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals, entered in Case No. 15,624 on April 6, 1965.

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APPENDIX

APPENDIX

APPENDIX A

Nos. 15624-25

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PAUL GIBBS, *Plaintiff-Appellee*

v.

UNITED MINE WORKERS OF AMERICA, *Defendant-Appellant*

PAUL GIBBS, *Plaintiff-Appellant*

v.

UNITED MINE WORKERS OF AMERICA, *Defendant-Appellee*

APPEAL from the United States District Court for the Eastern District of Tennessee.

Decided April 6, 1965.

Before CECIL, O'SULLIVAN and PHILLIPS, Circuit Judges.

O'SULLIVAN, Circuit Judge. Plaintiff Paul Gibbs, appellee in No. 15,624 and cross-appellant in No. 15,625, recovered a $75,000 judgment entered on a jury verdict against defendant United Mine Workers, appellant in No. 15,624 and appellee in No. 15,625. No. 15,624 presents the United Mine Workers' appeal from such judgment. No. 15,625 is Gibbs' cross-appeal from the setting aside of one item of the jury's award of damages. This case is

the latest in a series in which we have considered the collisions between the UMW and those who have sought to operate coal mines in Kentucky and Tennessee without signing UMW contracts.[1] The violence here involved was less spectacular than that described in those decisions. From the evidence, the jury could and did find that by violence and continued picketing the UMW prevented the Grundy Mining Company from opening a coal mine field in the Gray's Creek area of Marion County, Tennessee, and thereby deprived plaintiff Gibbs of his contracts to superintend the mine operation and to truck coal from the mines. Gibbs' complaint charged in substance that the objective of defendant's conduct was to induce and force employees of Grundy Mining Company to refrain from working in the mines, thereby causing Grundy to cease doing business with him as its superintendent and as an independent trucking contractor. His pleadings asserted that defendant's actions constituted a secondary boycott prohibited by Sections 8(b)(4) and 303 of the National Labor Relations and Taft-Hartley Acts, 29 U.S.C.A. §§ 158(b)(4) and 187, and violated the common law of Tennessee as an unlawful interference with his contracts of employment and haulage.

Motions to dismiss and for direction of a verdict were denied. Interrogatories submitted to the jury called for separate answers on each issue in the case, and by its answers the jury found defendant guilty of the charged

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[1] *UMW* v. *Meadow Creek Coal Co.*, 263 F(2) 52 (CA 6, 1959), *cert. denied*, 359 U.S. 1013 (1959); *UMW* v. *Osborne Mining Co.*, 279 F(2) 716 (CA 6, 1960), *cert denied*, 364 U.S. 881 (1960); *Gilchrist* v. *UMW*, 290 F(2) 36 (CA 6, 1961), *cert. denied*, 368 U.S. 875 (1961); *Flame Coal Co.* v. *UMW*, 303 F(2) 39 (CA 6, 1962), *cert. denied*, 371 U.S. 891 (1962); *Sunfire Coal Co.* v. *UMW*, 313 F(2) 108 (CA 6, 1963), *cert. denied*, 375 U.S. 924 (1963); *White Oak Co.* v. *UMW*, 318 F(2) 591 (CA 6, 1963), *cert. denied*, 375 U.S. 966 (1964); *Allen* v. *UMW*, 319 F(2) 594 (CA 6, 1963); *Price* v. *UMW*, 336 F(2) 771 (CA 6, 1964), *cert. denied*, 33 U.S.L. Week 3286 (U.S. March 1, 1965) (No. 791).

violations of the Federal Statute and of the common law of Tennessee. The jury found that 1) UMW had struck Grundy, had induced or encouraged its employees to strike, and had threatened, coerced or restrained Grundy; 2) that an object of such activity was to force Grundy to cease doing business with Gibbs as to his trucking and employments contracts; 3) that such activity was not aimed at Grundy in a primary capacity; 4) that Grundy was engaged in commerce or an industry affecting commerce; 5, 6, 7) that UMW was party to a conspiracy to wrongfully interfere with Gibbs' contracts in violation of Tennessee law; 8, 9) that Gibbs suffered $60,000 damages with respect to his employment contract, and $14,500 damages as to the trucking contract; 10, 11) that Gibbs was entitled to recover $100,000 punitive damages. Upon the basis of the foregoing findings, the District Judge made the following rulings in disposing of defendant's motions for judgment n.o.v. or for a new trial:

1) That the loss of Gibbs' hauling contract was caused by a secondary boycott as well as by a common law conspiracy, but that the jury's award of $14,500 damages for such loss must be set aside since as a matter of law his proofs as to loss of profits had no probative value. This latter ruling is the subject of Gibbs' cross-appeal in No. 15,625.

2) That interference with Gibbs' contract of employment as mine superintendent was not a secondary boycott because in his status as an employee he could not be "any other person" vis-a-vis the Grundy Mining Company as the term is used in 29 U.S.C.A. § 158(b)(4)(B). That this follows from *Seeley* v. *Brotherhood of Painters,* 308 F(2) 52, 60 (CA 5, 1962) where the Court, dealing with a discharged employee's reliance on that Section, said

"It is the appellant-plaintiff's contention that the labor organization caused his injury by 'forcing or

requiring *any person* . . . to cease doing business with *any other person* . . .,' that is, by requiring his employers, Wiscombe Southern and Earl Paint Corporation, to discharge the plaintiff. We are cited to no case where the language 'to cease doing business with any other person' as used in this section has the same meaning as to discharge an employee. Literally, it could have that meaning but that would be foreign to the whole purpose of the section which has to do with a secondary boycott ban. No secondary boycott was involved in this case."

3) That even though Gibbs could not rely on the Federal secondary boycott statute to recover for loss of his employment contract, defendant's conduct did permit recovery for such loss under the common law of Tennessee; that because Federal jurisdiction was properly invoked as to Gibbs' claim for loss of his hauling contract it was proper to allow recovery under state law for the loss of his employment contract under the doctrine of *Hurn* v. *Oursler*, 289 U.S. 238, 77 L.Ed. 1148 (1933), and under this Court's decision in *UMW* v. *Meadow Creek Co.*, 263 F(2) 52 (CA 6, 1959), *cert. denied*, 359 U.S. 1013 (1959) and cases following *Meadow Creek*.

4) That improper argument by plaintiff's counsel did not vitiate the entire verdict, and should be considered only in appraising its claimed excessiveness.

5) That the $60,000 award for loss of Gibbs' employment contract was excessive by $30,000, the $100,000 award of punitive damages was excessive by $55,000, and that a new trial must be granted unless plaintiff remit such excessive parts of the awards.

The required remittiturs were accepted by plaintiff, and final judgment was entered in total amount of $75,000.

Turning to the factual background of these rulings, plaintiff Paul Gibbs had been engaged in the coal mining industry for many years, presumably as a miner, as a trucker and trucking contractor, and as a mine operator. In 1959 and 1960, two companies, Tennessee Consolidated Coal Company, referred to herein as Tennessee Consolidated, and Tennessee Products and Chemical Corporation, referred to herein as Tennessee Products, owned and were producing coal in the area in question. Gibbs had been working as a trucker and, as lessee of Tennessee Products, as a mine operator under contract with UMW. Tennessee Consolidated had had contracts with UMW, but after unsuccessful negotiations it terminated such contracts in early 1960 and its operations in what was known as the Coal Valley Mine were shut down by a strike. Prior to August, 1960, Tennessee Consolidated organized a subsidiary called Grundy Mining Company for the purpose of commencing operations in its Gray's Creek holdings. It sought to carry on this operation without a UMW contract, and to that end a number of employees were recruited without notice to former Coal Valley Mine workers, members of UMW. Notice of the new operation, however, was communicated in some manner to one John D. Cain, Jr., a representative of the rival Southern Labor Union. Grundy's president contacted plaintiff Gibbs on August 12, 1960 and they made a verbal contract whereby Gibbs was to be superintendent of the work at Gray's Creek at a starting salary of $600 per month and, as an independent operator, was to furnish trucks and haul the coal produced at Gray's Creek for a price of seventy-eight cents per ton.

The Gray's Creek area was within UMW District 19, whose representative there was one George Gilbert. More particularly, Gray's Creek was within the jurisdiction of defendant's Local No. 5881, whose members had worked at the Tennessee Consolidated Coal Valley Mine. The plan to open up Gray's Creek became known and on Sunday, August 14, pursuant to a posted notice and the call of their president, members of Local No. 5881 met to con-

sider the prospective opening. Monday, August 15, several members of Local No. 5881 went to the entrance of the Gray's Creek work site shortly after Paul Gibbs' arrival there in the early morning. Paul Gibbs, John Cain, representative of the Southern Labor Union, and a number of miners hired to work at the Grundy mine were then and there persuaded not to attempt to commence work. There was evidence that such persuasion was aided by the display of firearms. The next day, August 16, Gibbs, Cain and a substantial number of miners who had been employed by Grundy again arrived at the mine site. Again, they were persuaded and induced not to go to work. This time, however, the persuasion was more impressive. A crowd estimated at 75 to 125, including members of Local No. 5881 was on hand, a large number carrying various types of firearms. It will be sufficient to say that by display and pointing of guns, by beating Cain and burning his brief case, and by "escorting" Gibbs and Cain out of the area by a motorcade, the Mine Workers effectively induced Grundy's employees not to go to work and prevented Grundy Mining Company from opening the Gray's Creek mine. This threshold success was thereafter made secure by around-the-clock picketing of the entrance to the mine area. Picketing continued for eight or nine months during which Grundy Mining Company made no further effort to open the mine.

The proofs were sketchy as to defendant's responsibility for the described conduct. It was stipulated that defendant would be liable for action taken by District 19 representative Gilbert in the course of his employment. Gilbert and members of the Local testified that Gilbert neither knew of nor inspired the Sunday meeting or the conduct which followed on Monday and Tuesday. Gilbert testified that he was at a meeting at Middlesboro, Kentucky, on the two days of violence and did not learn of the "spontaneous" action of the Local members until Tuesday. He knew that he was then advised by his superiors to repair to the mine

site and see to it that the pickets behaved thereafter. It is clear that after the initial success of the violence, the fruits thereof were made secure by picketing which was approved by and was under the control of District 19; UMW subsistence payments were made to the picketers as well as to other unemployed mine workers.

In support of his contention that the UMW through its representative Gilbert knew of and probably inspired the Local's conduct, and that he, Gibbs, was personally the primary target of the described activities, Gibbs offered a miscellany of proofs. He testified that "to the best of my knowledge" he saw Gilbert's car at the scene of the events of August 15 or August 16 and that "I'm thinking that I seen Mr. Gilbert drive up there," although Gibbs also stated that "he [Gilbert] didn't play any part that I seen"; that on August 18 he called Gilbert to inquire why he hadn't shown up for an arranged meeting with Gibbs and asked Gilbert what he wanted of Gibbs, and Gilbert replied, "I want you to keep your damn hands off of that Gray's Creek area over there and tell that Southern Labor Union that we don't intend for you to work that mine." Gilbert's attitude toward Gibbs was further portrayed by his statements to another that, "Hell, we can't let that go on," and that "Paul was trying to bring the other union in there, and he [Gilbert] said he ain't going to get by with it." A third witness reported Gilbert as saying, "Paul was trying to bring the Southern Labor Union into the coal fields," and "he said the union wouldn't let him do it," and "they had ways of preventing him from doing it . . . he seemed to think Gibbs was going to have to go," and "he said he had friends in high places that could move him out from the mining business." Further evidence of a purpose to impede Gibbs' continued pursuit of the mining business was furnished by proof that within a week or so after the violence of August 15 or 16, a sack was burned at the mouth of another mine then being operated by Gibbs under a lease with another owner; that the smoke from such a

burning would suffocate workers in the mine if they stayed there long enough, and that the belt on an exhaust fan had been cut several times. There was no proof directly connecting any member of defendant union with this activity.

Some evidence was also offered to show that overt threats or acts of violence were not limited to August 15 and 16. There was proof that on one occasion during the continued picketing of the Gray's Creek mine a visitor to the area observed a rifle against a log at the side of the road near a tent presumably used by the pickets. George Gilbert was among the group of men there present and told the visitor that he could not go down the Pocket Road (near the Gray's Creek mine site) but suggested another route to the visitor's destination along which he would observe some of Gilbert's men, whom he was to tell that Gilbert said it was all right to pass. Further evidence of the union's purpose to use force to keep Grundy from operating the mine was provided by proofs that on August 17 or 18, after Gilbert presumably took charge of affairs, a crowd of about 100 to 125 men, some recognized as members of the UMW, gathered near the office of Tennessee Consolidated Coal Company (parent of Grundy Mining) at Palmer, Tennessee. Two officers of the company were harassed by the crowd, some of whom were carrying guns. One of the company officers was manhandled and cursed, and one of the crowd "put a 30-30 carbine on" him as he was getting into his car.

There was evidence that after the events of August 15 and 16, Gibbs was unable to get haulage contracts with various operators, including some for whom he had hauled before. Ultimately he lost some of his trucks. He was also unsuccessful in getting employment as a mine superintendent and in due time leases that he had had with the Tennessee Products & Chemical Company were cancelled. Some time in 1961, Tennessee Consolidated made a contract with the Chicago firm of Allen & Garcia. This firm entered into a contract with the UMW, reopened and oper-

ated the Coal Valley Mine and then in July, 1962, started extensive operations in the Gray's Creek area. It was shown that Gray's Creek was one of the best coal areas in the region and that it had been contemplated that eventually Grundy Mining was to have opened around ten mines there. Grundy soon took over from Allen & Garcia and these plans were substantially accomplished. An official of the Tennessee Consolidated Coal Company testified that after the Gray's Creek area was finally opened, Paul Gibbs was not hired because "Had I hired Mr. Paul Gibbs none of these mines would be open today"; that they would be closed by "the members of the United Mine Workers of the area." The truth of most of the foregoing testimony was challenged by defendant's contrary proofs but resolution of the factual issue made was for the jury, if the case was properly submitted to it. We hold that it was.

1) *Was there evidence of a secondary boycott?*

Appellant UMW contends that the activities described constituted a single primary strike at the premises of Grundy Mining Company to force the hiring of UMW members. The jury, however, found that an object of the defendant's activities was to force the Grundy Mining Company to cease doing business with Gibbs with respect to his contract of employment and his hauling contract. It also found that the union's activity was not a primary strike or primary picketing of Grundy Mining Company. The District Judge set aside the jury's finding of a secondary boycott as to Gibbs' employment contract for the reasons noted above, but sustained its finding of a secondary boycott as to his hauling contract. For the reasons outlined below, we find it unnecessary to determine whether Gibbs ultimately proved the existence of illegal secondary boycott pressure as to either contract. We share the District Judge's view that "the statement in the *Electrical Workers* case [*Local 761, IUE* v. *NLRB*, 366 U.S. 667, 673 (1961)] that 'the distinction between legitimate "primary

activity" and banned "secondary activity" . . . does not present a glaringly bright light' is an effective understatement of the complex and vague wording of the sections of the Act here involved." Certainly here it is difficult to separate the "primary" from the "secondary" and to demonstrate with complete assurance the duality of defendant's objectives. If solution of the problem is a matter of factfinding, the jury's verdict would foreclose further inquiry. But if the answers must be found in a conclusion of law, we are at least satisfied that the federal questions presented by plaintiff's pleadings and proofs were not so "plainly unsubstantial" as to destroy federal jurisdiction. Once District Court jurisdiction had thus attached, the doctrine of *Hurn* v. *Oursler,* 289 U.S. 238, 77 L. Ed. 1148 (1933) permitted the jury to consider whether the same facts claimed to make out a case of secondary boycott did not also prove that a Tennessee common-law tort had been committed by the defendant. The jury's express determination that such a tort had indeed been committed is sufficient to sustain its award of damages, so we find no need to review its determination of the secondary boycott claims.

Our present application of the doctrine of pendent jurisdiction is not novel. In *Hurn* v. *Oursler,* Mr. Justice Sutherland quoted from *Siler* v. *Louisville & N.R.R.,* 213 U.S. 175, 191, 53 L. Ed. 753, 757 (1909), where the Court ruled that once federal question jurisdiction had been acquired the circuit court "had the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or *even if it omitted to decide them at all, but decided the case on local or state questions only.*" (Emphasis supplied.) *UMW* v. *Meadow Creek Coal Co.,* 263 F(2) 52 (CA 6, 1959), *cert. denied,* 359 U.S. 1013 (1959) applied this theory in a case where, as here, the same conduct was claimed to constitute both a secondary boycott and a conspiracy prohibited by Tennessee common law. There the

UMW argued that "the trial court, having in effect held that there was no violation of the federal Act, had no jurisdiction to determine and decide the common law or non-federal cause of action." 263 F(2) 59. We upheld federal jurisdiction to grant relief under state law, however, observing that "the claim of secondary boycott and unlawful conspiracy are not separate causes of action, but merely different grounds to support a single cause of action." 263 F(2) 60. We have continued to apply the rule of pendent jurisdiction, most recently in *Price* v. *UMW,* 336 F(2) 771, 775 (CA 6, 1964), *cert. denied,* 33 U.S.L. Week 3286 (U.S. March 1, 1965) (No. 791), and we are pointed to no persuasive reason for refusing to apply it here.

We are satisfied that plaintiff's evidence clearly made out a case for the jury upon the claim of common-law tort. The jury's answer to the interrogatory in this regard is independent of the secondary boycott finding and is sufficient to sustain the damage award.

2) *Did federal preemption forclose action under the state common law?*

Appellant next argues that even assuming that jurisdiction to determine a state claim for interference with Gibbs' contracts would otherwise exist, federal law has preempted the existence of any such claim. Primary reliance is placed on *Local 20, Teamsters Union* v. *Morton,* 377 U.S. 252 (1964), reversing our decision in *Morton* v. *Local 20, Teamsters Union,* 320 F(2) 505 (CA 6, 1963). We disagree with this argument. The *Morton* case decided only that where a state claim arising from a labor dispute did not rely on violence as part of the charged tortious conduct, it could not be prosecuted independently of, or pendent to, an action under the Federal Act. In *Morton* there was no charge of violence to support the state common-law action. It had been held in *San Diego Bldg. Trades Council* v. *Garmon,* 359 U.S. 236, 247 (1959) that absent violence, state common-law actions for torts arising from conduct arguably protected or prohibited by the Na-

tional Labor Relations Act were preempted by the superior Federal interest. The Supreme Court, however, noted that,

> "we have allowed the States to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order. *United Automobile Workers* v. *Russell*, 356 U.S. 634; *United Construction Workers* v. *Laburnum Corp.*, 347 U.S. 656. . . ."

In our decision in *Price* v. *United Mine Workers, supra,* we noted the inapplicability of *Morton* where "unlawful acts of force and violence" are involved.

Appellant argues, however, that the UMW did not authorize or know of the violence of August 15 and 16 engaged in by members of its Local, and in any event that there is no way to distinguish damages flowing immediately from the initial violence and those which may have come to Gibbs from the subsequent eight months of picketing which effectively and permanently took away the benefits of his contracts with Grundy Mining Company. Wholly apart from our view that there was circumstantial evidence from which the jury could find that District 19's representative Gilbert had a part in arranging the events of August 15 and 16, we gain the impression that the threat of violence remained throughout the succeeding days and months. The night and day picketing that followed its spectacular beginning was but a guaranty and warning that like treatment would be accorded further attempts to open the Gray's Creek area. The aura of violence remained to enhance the effectiveness of the picketing. Certainly there is a threat of violence when the man who has just knocked me down my front steps continues to stand guard at my front door.

Whether it be inferred that defendant UMW through its agents had a hand in planning and carrying out the original violence, whether they ratified the violent conduct by

using it to make effective the subsequent so-called peaceful picketing, or whether the violent character continued as a threat throughout the entire picketing, we believe that violence was part of the common-law tort involved, and action therefor was saved from preemption by the rule of *San Diego Bldg. Trades Council* v. *Garmon, supra; United Automobile Workers* v. *Russell, supra; United Construction Workers* v. *Laburnum Corp., supra.*

3) *Improper argument to jury.*

The UMW contends that in all events a new trial should have been awarded because of improper argument to the jury. The District Court conditionally denied the motion for new trial, ruling that,

> ". . . the argument was improper. While an advocate may share his client's prejudices against an adversary, he cannot properly share them with the jury, particularly when they do not relate to any matters in evidence. However, the Court is of the opinion that the argument was not so prejudicial as to warrant a new trial, but should rather be taken into consideration by the Court upon the issue of excessiveness of the verdict."

Finding the verdict of compensatory damages for loss of Gibbs' employment contract excessive by $30,000, and the verdict of punitive damages excessive by $55,000, denial of a new trial was conditioned upon acceptance of a remittitur in those amounts. Gibbs accepted the remittitur.

It is now argued that "the District Court clearly found that the argument did prejudice United Mine Workers rights, and that such a finding absolutely requires a new trial." It is the law that where an excessive verdict results from appeals to passion, prejudice, or caprice, a remittitur may not be employed to cure the error. *Minneapolis, St. P. & S.S.M. Ry.* v. *Moquin,* 283 U.S. 520, 75 L.Ed. 1243 (1931); *Ford Motor Co.* v. *Mahone,* 205 F(2) 267 (CA 4, 1953); *Brabham* v. *Mississippi ex rel. Smith,* 96 F(2) 210

(CA 5, 1938), *cert. denied*, 305 U.S. 636, 83 L. Ed. 409 (1938). We so held in *National Surety Co.* v. *Jean*, 61 F(2) 197 (CA 6, 1932).

Defendant's motion for a new trial charged that the jury's verdict was the result of passion, prejudice or caprice. Though thus challenged to do so, the District Judge did not find that the verdict was so infected. The District Judge found that counsel's argument was improper but we do not believe his statement that it was "not so prejudicial as to warrant a new trial" should be construed as expressing by negative implication a finding that the verdict was the product of passion, prejudice or caprice. The heart of his finding rather is revealed in his statement that the impropriety of the argument was "to be taken into consideration . . . upon the issue of excessiveness of the verdict." The peculiar nature of many of the remarks leads us to conclude that he found the remarks to fall within a very narrow category calculated to influence the size of a favorable verdict without affecting the determination on the merits. These remarks are set out in full in the margin to demonstrate why we have come to this conclusion, and why we find ourselves unable to disagree with the court's finding.[2] This finding distinguishes this

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[2] Counsel's remarks include the following:

"Now, what they are doing is what I call legal warfare. They will do what they please, the law doesn't mean (snaps fingers) that to them . . . And as Mr. Kramer told you, if you finally get down to damages, if it is not too much we'll pay it off and do it again. So what. If it is too much we will appeal it and stall a few years. Now, that is the way they work."

"Now, this poverty in the coal field that Mr. Kramer was talking about . . . We've got coal, and we've got men who want to work and mine coal. Now, who is the bugger? The bugger is the United Mine Workers of America, for the simple reason that they are going to pass work on their terms or else. And if a few people starve in the midst, what difference does that make . . ."

". . . in addition even if you awarded $100,000 [plaintiff's requested punitive damages] they would chuckle in their sleeves and walk out of this courtroom and laugh. They will pay off the

case from the cases cited above where the trial judges had found the verdicts to be products of passion, and moves it into the traditional area where a remittitur may be employed to avoid an excessive verdict without resort to a new trial. Thus viewed, we do not find an abuse of discretion in the District Judge's action.

4) *Plaintiff's cross-appeal.*

By his cross-appeal, No. 15,625, plaintiff Gibbs challenges the District Judge's action in setting aside the jury award of $14,500 damages for interference with his contract to haul coal. The District Judge found that there was no probative evidence to support plaintiff's own $14,029.28 estimate of his lost profits and that such estimate was "admittedly based upon carrying loads in excess of the permissible weight limits . . . under the laws of Tennessee." We agree with the District Judge.

Plaintiff's estimate of his lost profits rests on unwarranted assumptions. Using the contract price of seventy-eight cents per ton, he calculated at $27,300 the income from hauling 35,000 tons of coal under a contract for sale to the Redstone Arsenal. Expenses of hauling were then calculated at $13,270.72 *on the assumption* that the five proposed Gray's Creek mines would be producing 10,000

$100,000 and say oh, well, so what. We've got mixed up, it cost us this much, now let's go back and do the same thing again. I give you my word that that is exactly what this Union is counting on. It's the same thing as a fellow that has been caught nine times driving while drunk, and every time he has been brought up they have fined him $1.00. As soon as he got out of the courtroom he would go get him another drink, and that is just exactly what this union is counting on here."

"Now, we believe that all of those elements taken together . . . adequately sustain a compensatory award of $250,000. Now, that sounds like a lot of money, but let me point out to you, look who you are dealing with, too. Don't overlook it. The International Union of the Mine Workers of America . . . Certainly, they want you to be light on them, so they can pay it back and go over there and blow up another mine, or conduct similar activities."

tons per week, although that assumption was based only on plaintiff's "about 30 years experience that I've had in coal mining." Since under this assumption the 35,000 tons of coal could be hauled in three and one-half weeks, the expense figure included wages, repairs, workmen's compensation insurance, truck insurance, payroll taxes, truck tags, telephone, and depreciation costs for only that length of time. Gibbs himself admitted at trial that he could not have delivered the coal in three and one-half weeks if production were at less than 10,000 tons per week. His production estimate is weakened on its face by his failure to attempt reasoned explanation of the figure chosen, by his implied admission that he did not really know what kind of equipment would have been available at the new mine sites, and by his assumption that he could have got the five mines up to a production of 2,000 tons per week each within the space of two weeks. Paul B. Callis, president of Tennessee Consolidated Coal and its subsidiary, Grundy Mining Company, provided testimony weakening the estimate much further by his statement that it had not been decided whether to open five mines at Gray's Creek or only two—"the basic plan was to open two mines to produce approximately 600 tons in each, per day. . . ." Callis also estimated that it would take between six months and one year to get these two mines into full production.

The test which the Tennessee courts would apply in testing the sufficiency of evidence of lost profits under circumstances like those involved here is spelled out in *Anderson-Gregory Co.* v. *Lea,* 51 Tenn. App. 612, 620, 370 SW(2) 934 (1963):

> ". . . when a contract though of some magnitude is informal, and . . . is not within the Statute of Frauds because it is a contract for labor, and nothing has been produced under such a contract but only preparation to produce has been made, . . . only in a clear case, where the proof of profits is devoid of any ele-

ment of speculation and shows all proper means taken to minimize loss should a recovery be allowed for prospective profits."

Plaintiff's only proof of loss was his estimate based on the expenses of three and one-half weeks' operations. Such assumption as to production is too speculative to justify submission of such evidence to the jury. Any possibility of doubt, however, is removed by reviewing the finding of illegality in the proposed operations.

Without going into detail, it is clear that Gibbs' statement of the manner in which he proposed to perform his hauling contract involved violation of the existing laws limiting axle weights. We agree with the District Judge's conclusion that estimates of profits based on proposed violation of state axle-weight laws are of no probative value.

> "Loss of profits may not be considered as an element of damages, where the business from which they would have resulted was, or would have been, conducted in violation of law."

17 C.J. *Damages* § 119. See also 25 C.J.S. *Damages*, § 42b, p. 519; 15 Am. Jur. *Damages* § 157, p. 575; Annot., 52 L.R.A. 33, 66 (1913). The District Judge correctly relied on *Shelley* v. *Hart*, 112 Cal. App. 231, 297 Pac. 82 (1931), for his view that profit estimates which contemplate illegal operations will not support an award, especially where they provide no means of separating the legal from the illegal.

It is impossible to know how Gibbs' estimated profits would have been affected by legal operation instead of illegal. When this infirmity is added to an already uncertain showing, it must be agreed that no proper evidence was offered to support the jury verdict.

Judgment affirmed.

Judgment

(Filed April 6, 1965)

Appeal from the United States District Court for the Eastern District of Tennessee.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Tennessee and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Plaintiff-Appellee recover from Defendant-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

s/ CARL W. REUSS, *Clerk*

Opinion on Motion to Dismiss

Filed October 26, 1962.

By motion to dismiss the defendant has raised the issue of the jurisdiction of the Court in this case. The complaint purports to allege a cause of action for damages as a result of a secondary boycott arising out of a labor dispute and for damages as a result of an unlawful conspiracy to injure the plaintiff in his employment and otherwise. Jurisdiction purports to be alleged in the complaint upon the grounds of diversity of citizenship and jurisdictional amount and upon the grounds that a federal question exists under 29 U. S. C. A. 187, the secondary boycott provision of the Taft-Hartley Act. The motion to dismiss is based upon two grounds, first that the complaint fails to allege a cause of action under federal law (29 U.S.C.A. 187), and second that the Court is without jurisdiction to try the alleged common law action of tort or conspiracy.

For the exact allegations of the complaint it is of course necessary to refer verbatim to the complaint. By way of summary, however, it appears that the complaint purports to allege that the plaintiff had an employment contract to act as mine superintendent with Grundy Mining Company at a salary of $600 per month, and in addition a truck hauling contract with the same company to haul all coal mined at 78¢ per ton, and that the plaintiff was deprived of the benefits of both the employment contract and the trucking contract by action of the defendant Union in preventing the opening of the Grundy Mining Company mines by mob action and violence. Some lack of clarity in this respect is caused by the omission in the final paragraph of the complaint of any reference to the loss of the trucking contract, the plaintiff's damages there being confined to the interference "with his contract of employment."

In addition to the above rather specific allegations, by amendment to the complaint the plaintiff alleges that the

defendant has threatened, induced and encouraged other "neutral employers," including Tennessee Products and Chemical Company, "not to do business" with the plaintiff.

As indicated above, the complaint purports to allege federal jurisdiction on the grounds of diversity of citizenship and jurisdictional amount. However, the defendant is alleged to be an unincorporated association and for jurisdictional purposes in diversity cases, the unincorporated association can have no citizenship apart from that of its members and proper citizenship of all members must be alleged to exist before diversity will exist. 2 Barron & Holtzoff, Federal Practice and Procedures, sec. 487.

Upon the basis of the allegations of the complaint, the defendant contends that there is no allegation of an actionable secondary boycott under 29 U. S. C. A. 187, in that (1) any alleged loss or damage to the plaintiff was a result of primary action of the Union toward Grundy Mining Company and not a secondary boycott, and that the alleged existence of violence does not in any way affect the existence or non-existence of a secondary boycott, (2) the plaintiff, as a supervisory employee of Grundy Mining Company, was not such a "person" as is referred to in 29 U. S. C. A. 187 as having a cause of action by reason of a secondary boycott, (3) the primary dispute was between the defendant and Grundy Mining Company, and that the plaintiff was acting as a part of the primary employer, and therefore no secondary boycott existed, (4) the alleged actions of the defendant to get others "not to do business" with the plaintiff is unconnected with any loss alleged by the plaintiff, and therefore not an actionable allegation of a secondary boycott. It is further contended by the defendant that, there being no jurisdiction by reason of a federal question, the Court is without jurisdiction of the alleged common law conspiracy or tortious conduct allegations.

On the basis of the allegations in the complaint, the plaintiff asserts more than one interpretation of the complaint. He contends that a secondary boycott under 29

U. S. C. A. 187 is alleged (1) in that the primary dispute was between Gibbs and the Union, and the union activity as to Grundy Mining Company insofar as it affected Gibbs was therefore secondary, (2) in that the primary dispute was between Gibbs and the Union, and the union activity as to employees of Gibbs was therefore secondary, (3) in that union activity and threats toward Tennessee Products and Chemical Company to induce it not to do business with Grundy Mining Company and the plaintiff was a secondary boycott as to both the plaintiff and Grundy Mining Company, (4) in that the Union activity and threats toward "others" to induce them not to do business with the plaintiff was a secondary boycott, (5) in that union activities and threats toward employees of Grundy Mining Company was a secondary boycott as to the plaintiff, and (6) in that union activities and threats toward employees of Southern Labor Union was a secondary boycott as to the plaintiff. It is further contended by the plaintiff that the Court, having jurisdiction over the secondary boycott phase of the case, therefore has ancillary jurisdiction over the common law conspiracy for tortious conduct allegations of the complaint. The Court has difficulty in reading into the complaint all of the various theories advanced by the plaintiff. Part of the difficulty is occasioned by the fact that the complaint is quite specific as to the employment and trucking contracts of the plaintiff with Grundy Mining Company and the union activities toward Grundy Mining Company depriving the plaintiff of the benefits of these contracts, but any other theory of the plaintiff's cause of action must be based upon either (1) a general allegation that "others" were involved, or (2) a specific allegation that Tennessee Products and Chemical Company was involved. No allegation of damage is alleged with respect to the latter two allegations except that they were induced "not to do business" with the plaintiff. The specificness of the complaint in some respects, coupled with its extreme generality in other respects, can be misleading.

Although the Court is unable to read into the complaint all of the theories advanced by the plaintiff with respect to the allegations of a secondary boycott, and, although the Court would be unable to accept each of the plaintiff's theories as constituting a secondary boycott under 29 U. S. C. A. 187, even if they were read into the complaint, nevertheless it does appear to the Court that a secondary boycott may be sufficiently alleged so that the plaintiff should not be put out of court on a motion to dismiss. (This conclusion is fortified by the practice of general pleading permitted in the federal courts.)

First it appears that the allegation that the defendant induced or encouraged Tennessee Products and Chemical Company and "others" "not to do business" with the plaintiff might allege a secondary boycott within the Act. It is pointed out by the defendant that there is no alleged connection between this allegation and the Grundy Mining Company or any damages which the plaintiff sustained. Under Sec. 187 (b) only damages that are a result of the secondary boycott would be recoverable. Although no specific damages are alleged to have resulted from the defendant's having induced or encouraged Tennessee Products and Chemical Company or "others" not to do business with the plaintiff, damages might be inferred from such an allegation. In view of the fact that other specific injuries and damages are alleged in the complaint, and in view of the fact that the plaintiff will be required on the trial to establish by evidence such injury before the case can be submitted to the jury on this theory of a secondary boycott, it is the opinion of the Court that the plaintiff should be required to further amend his complaint to allege what, if any, injury the plaintiff sustained as a result of the matters alleged in paragraph IX of the amended complaint. If no injury or damage can be alleged or proven as a result of the union activity toward Tennessee Products and Chemical Company or "others," then this theory of jurisdiction should be removed from the case without the necessity or expense of a trial.

It further appears to the Court that a secondary boycott may be alleged or inferred from the complaint so as to grant jurisdiction upon the theory that a primary labor dispute existed between the plaintiff and the defendant, and that one object of the Union in its activities toward Grundy Mining Company was unlawfully to induce or persuade Grundy Mining Company to cease doing business with the plaintiff. It is contended by the defendant that the primary dispute alleged is between Grundy Mining Company and the Union. A prohibited secondary boycott is defined at 29 U. S. C. A. 158 (b) (4) as the inducing or encouraging of others if the "object" thereof is to cause them to cease doing business with another. The crux of the matter therefore is as to whether any part of the "object" of the Union in its activities involving Grundy Mining Company was to cause it to cease doing business with the plaintiff. The fact that it may have had other or additional purposes does not relieve it of the charge of a secondary boycott. As stated in the case of *Flame Coal Company* v. *United Mine Workers of America,* 303 F. 2d 39 at 42, "This Union cannot escape the charge of secondary boycott because it chose to attack on all fronts at once, claiming its desire and objective to be the recognition of all involved, whether producers, transporters or processors of coal." What the object of the Union may have been in its activities toward Grundy Mining Company may be in dispute and therefore a motion to dismiss should not be sustained upon this.

The defendant relies upon the case of *Seeley* v. *Brotherhood of Painters* (C. A. 5), . . . F. 2d . . ., 51 L. R. R. M. 2042, wherein the Court held that a supervisory employee was not such a "person" as would be entitled to a cause of action under the secondary boycott provision of the Taft-Hartley Act for his discharge by his employer as a result of the Union's inducing or encouraging his employer to do so. Without passing upon the rationale of the *Seeley* case at this time, it is sufficient to point out

in the present case that the injury to the plaintiff may be in his capacity as a trucker and not merely as an employee. It would appear that in his capacity as an independent trucker the plaintiff would be such a "person" as would be entitled to assert rights under the Federal Boycott Law.

Having determined that the defendant's motion to dismiss upon the ground that no federal question is involved should be overruled, it would follow that the defendant's motion to dismiss the common law charge of conspiracy or tort for lack of jurisdiction should likewise be overruled. Under the case of *Hurn* v. *Oursler,* 89 U. S. 238, the Court, having jurisdiction of the federal question, would have ancillary or pendent jurisdiction of the common law allegations.

The defendant's motion to dismiss will therefore be overruled. However, the plaintiff will be required to amend his complaint to allege more specifically any damages claimed to have resulted by reason of the matters alleged in paragraph IX of his complaint as amended, or otherwise this paragraph will be stricken from the complaint. This amendment shall be made within five (5) days.

An order will enter accordingly.

FRANK W. WILSON,
United States District Judge.

Opinion

Filed July 18, 1963.

This case is now before the Court upon the motion of the defendant, United Mine Workers of America, for either a judgment notwithstanding the verdict or for a new trial. Upon trial of the case the jury found in response to special issues that the defendant, United Mine Workers of America, hereinafter referred to as "UMW", had violated the so-called secondary boycott provisions

of the Taft-Hartley Act (29 U. S. C. 187) and had committed the tort of unlawful interference with the plaintiff's contract rights, and awarded the plaintiff compensatory and punitive damages in the total sum of $174,500. Some of the background to this lawsuit is undisputed in the record and may be stated as follows. Tennessee Consolidated Coal Company, hereinafter referred to as "Consolidated", owns extensive coal lands in the Southeastern Tennessee Coal Fields and over a period of many years has engaged both directly in the mining of coal and in the leasing of coal lands to others to mine. Prior to March 15, 1960, Consolidated had operated a mine in Marion County, Tennessee, known as the Coal Valley Mine, this mine being operated under a collective bargaining agreement with the UMW. The Coal Valley Mine was closed down by a strike upon that date when negotiation of a new collective bargaining contract failed after termination of the former contract by Consolidated in accordance with its terms.

In August of 1960 Grundy Mining Company, herein referred to as "Grundy", a wholly owned subsidiary of Consolidated, took steps to open new mines in the Gray's Creek Area of Marion County, Tennessee, within the general vicinity of the Coal Valley Mine and upon Consolidated coal lands. In preparation for opening these new mines Grundy agreed to employ Paul Gibbs, the plaintiff herein, as mine superintendent at a salary of $600 per month. At the same time Gibbs asked for the contract to haul the coal from the new mines at a price of 78¢ per ton and this was also agreed upon by the parties. Both the employment contract and the trucking contract were for an indefinite period. Gibbs' background was that of a coal operator and trucker.

Grundy proposed to open the new mine in the Gray's Creek Area without a contract with the UMW. Upon Monday, August 16, 1960, the first day work was scheduled to begin, Gibbs and a few others appeared for work,

but picketing and a show of force took place by UMW members who were former employees of the Coal Valley Mine and no work was done. Violence or threatened violence continued the next day and all efforts by Grundy to open the mines in the Gray's Creek Area appear to have ceased after the second or third day. The picketing continued from August, 1960, until the following May, 1961. Gibbs drew one check of $300 under his salary agreement. He never got to haul any coal under his trucking contract with Grundy. In May of 1961 Consolidated contracted with a firm by the name of Allen & Garcia, an engineering firm, as operators to reopen the Coal Valley Mine and this was done by Allen & Garcia under a collective bargaining agreement with UMW. This lawsuit was begun in August of 1961, but to carry events down to the time of the trial, it appears that the Coal Valley Mine continued in operation by Allen & Garcia under contract with the UMW until it was closed in the early summer of 1962 when a fault in the coal seam was struck. Thereupon Allen & Garcia opened a new mine in the Gray's Creek Area and moved the Coal Valley equipment and personnel to the new mine. In September of 1962 Allen & Garcia terminated its operating contract with Consolidated and gave notice of termination of the UMW contract. Grundy thereupon took over the Gray's Creek operation, and in addition opened some seven or eight hand loading mines in the area, but did not further employ Gibbs in any of these operations.

This lawsuit was begun upon August 23, 1961, when the plaintiff, Gibbs, filed suit herein against the UMW seeking to recover compensatory and punitive damages and alleging that UMW had violated Section 303 of the Taft-Hartley Act (29 U. S. C. 187) and was guilty of a common law conspiracy aimed at him. The case was tried by the plaintiff upon the theory that the UMW had directed its unlawful activities toward various coal operators with whom Gibbs had business dealings or with

whom he anticipated doing business, including Grundy, Consolidated, Tennessee Products and Chemical Company, and one George Ramsey, in an alleged effort to cause them to cease doing business with him or to refuse to do business with him. At the conclusion of all of the evidence the Court concluded that the evidence was insufficient to warrant submitting to the jury the issues with reference to any losses sustained by the plaintiff by reason of any UMW activities directed toward inducing Consolidated, Tennessee Products & Chemical Company and George Ramsey to either cease or refuse to do business with Gibbs, but rather that the case should be submitted to the jury only with reference to any compensatory or punitive damages the plaintiff might be entitled to recover by reason of UMW activities alleged to have been directed toward having Grundy terminate its employment contract and its trucking contract with Gibbs.

The case was submitted to the jury upon a number of special isues. The jury found all issues in favor of Gibbs and against the UMW and awarded compensatory damages to Gibbs in the sum of $60,000 for termination of his employment contract with Grundy, and in the sum of $14,500 for termination of his trucking contract with Grundy and awarded punitive damages to Gibbs in the sum of $100,000, for a total award of $174,500 to the plaintiff.

A number of grounds in the defendant's motion for a judgment notwithstanding the verdict, or in the alternative for a new trial, are directed toward alleged errors in the jury verdict in finding that the defendant violated the secondary boycott provisions of the Labor-Management Relations Act. It is the contention of the defendant in this regard that under the evidence in this case there either was no secondary boycott as a matter of law, or that the evidence preponderates against such a finding. It is the contention of the defendant that no violation

by it of 29 U. S. C. 187 (Sec. 303 of the Labor-Management Relations Act as amended) was shown in the evidence as (1) there was no evidence that the defendant was responsible for the activity alleged to constitute a secondary boycott, and (2) any loss occasioned the plaintiff was at most the result of primary union activity and not the result of any secondary activity for the reason that (a) such activity was limited to the premises of Grundy Mining Company, the employer with whom the dispute existed, (b) the object of the activity was clearly to further claimed job rights with Grundy, and not to induce Grundy to cease doing business with Gibbs, (c) the plaintiff, as mine superintendent for Grundy, was not such "other" or "neutral" person as to be the object of a proscribed secondary boycott, but rather was a part of Grundy, the primary employer.

Considering the defendant's contentions in the order stated above, the Court is of the opinion that there was sufficient evidence in the record to warrant submitting to the jury the issue of the defendant's responsibility for activity alleged to constitute secondary boycott. By stipulation UMW admits its responsibility for acts of its field representative, George Gilbert, performed in the scope of his employment. Without now determining whether the evidence was sufficient to permit a jury finding that UMW was responsible for the activities and violence testified to as having occurred in the Gray's Creek Area upon August 15 and 16, 1960, it appears undisputed that the UMW became aware of such activities by the 16th. There is evidence upon which the jury could find that thereafter Gilbert participated in and supported, if not controlled, the picketing that occurred. The witness, Swope, testified that George Gilbert gave instructions to the pickets to permit Swope to pass through the picket lines. The witnesses, Gibbs, Campbell, and Higgins, each testified to conversations with George Gilbert during the course of the picketing indicating his

support of the picketing and his direction of union activities toward the end of prevenitng Gibbs from working for Grundy or from bringing into the Gray's Creek Area the Southern Labor Union, a competitive union. Whether Gilbert or the UMW was or was not responsible for any violence or threats of violence that may have occurred either before or after August 16 is not controlling on the issue of secondary boycott, as it is the object of the union activity that constitutes the essence of the unfair labor practice involved in a proscribed secondary boycott. As stated in the case of *NLRB* v. *International Rice Milling Co.*, 341 U. S. 665 at 672:

> ". . . Violence on the picket line is not material (and) . . . would not in itself bring the complained of conduct into conflict with Section 8(b)(4). It is the object of union encouragement that is proscribed . . . rather than the means adopted to make it felt."

The UMW next contends that Gibbs' loss of employment and loss of his trucking contract would at most be the result of primary union activity directed toward Grundy, and therefore not actionable under 29 U. S. C. 187, as the union activity was limited to the premises of Grundy. In support of its position in this regard, the defendant relies principally upon the case of *Electrical Workers* v. *Labor Board* (cited as *Local 761* v. *NLRB)*, 366 U. S. 667, which it is contended holds that picketing at the situs of the primary employer does not violate the secondary boycott provisions of Sec. 8 (b) (4) (A) of the National Labor Relations Act [29 U. S. C. 158 (b) (4) (A)]. It is believed by the Court that the holding in the *Electrical Workers* case is not controlling under the facts and circumstances of the principal case. That case involved a review of a National Labor Relations Board decision that held that picketing of the primary employer, General Electric Company, that extended to

a gate not used by employees of the primary employer, but which was rather used only by employees of independent contractors of General Electric Company, was an unfair labor practice under Sec. 8 (b) (4) (A) in a labor dispute between the union and General Electric Company. The Supreme Court affirmed this holding with the proviso that should it be made to appear that the independent contractors' employees performed work to a substantial extent that contributed to the normal operations of General Electric Company, then the picketing of such employees' gate would not constitute an unfair labor practice. In distinguishing the case it must be remembered that a Board decision and not a jury verdict was there involved and the appellate review is not the same. Even if the *Electrical Workers* opinion were, as contended by UMW, authority for the proposition that picketing at the situs of the primary employer could not constitute a Sec. 8 (a) (4) (B) unfair labor practice though it had a secondary effect upon others, this is not decisive of the issues in the principal case. No issue was involved in the *Electrical Workers* case but that General Electric was the object of the primary activity, whereas whether Grundy was the object of primary or secondary activity or both is one of the disputed issues in the principal case. No issue was there involved but that all union activity occurred on the premises of General Electric Company, the primary employer, whereas the activity complained of in the principal case occurred at various places at various times. The statement in the *Electrical Workers* case that "the distinction between legitimate 'primary activity' and banned 'secondary activity' does not present a glaringly bright light" is an effective understatement of the complex and vague wording of the sections of the Act here involved. The Court there likewise pointed out that the meaning of the secondary boycott provisions of the Act must be worked out with reference to the facts of a particular case rather

than in the statement of all-inclusive principles when it stated:

> "The nature of the problem, as revealed by unfolded variant situations, inevitably involves an evolutionary process for its rational response, not a quick, definitive formula as a comprehensive answer."

While the situs of the union activity would be evidence which the Jury might properly consider in determining the object of such activity, where the object is in issue, the situs is not self controlling in establishing a secondary boycott.

The essence of the statutory language pertinent to the issues of this lawsuit, when stripped of all non-applicable phrases and when stripped of references to interstate commerce, is as follows:

> "(b) It shall be an unfair labor practice for a labor organization or its agents . . .
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> "(4) (i) to engage in or to induce or encourage any individual . . . to engage in, a strike or refusal in the course of his employment . . . to perform any services or (ii) to threaten, coerce, or restrain any person . . ., where in either case an object thereof is
>
> (B) forcing or requiring any person to . . . cease doing business with any other person . . . provided that nothing contained in this clause (b) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . ."

When viewed in its essence, it is apparent that the specified union activity becomes unlawful and therefore actionable as a secondary boycott, when an *object* of such union activity is to force or require any person to cease doing business with any other person, provided that the

activity is not a primary strike or primary picketing, having only an incidental or secondary effect upon the other person. In this regard it is necessary to distinguish between primary activity having a secondary effect upon others, which is not actionable,[1] and activities directed toward one person and having as an object the causing of that person to cease doing business with another person with whom a primary labor dispute exists, which is actionable.[2]

The UMW next contends that under the facts of the principal case any union activity would in no event be actionable under 29 U. S. C. 187, as the object of the activity was clearly to further claimed job rights with Grundy, and not to induce Grundy to cease doing business with Gibbs. As stated above in discussing the issue of UMW's responsibility for any activity, the witnesses, Gibbs, Campbell, and Higgins, each testified to statements having been made by George Gilbert that would indicate that his purpose or object was to prevent Gibbs from working for Grundy or from bringing into the Gray's Creek Area the Southern Labor Union. This evidence would support the jury verdict when it found that an

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[1] *Electrical Workers* v. *Labor Board*, 366 U. S. 667 (1961); *Seafarers International Union* v. *NLRB*, 265 F. 2d 585 (D. C. Cir., 1959).

[2] *United Mine Workers of America* v. *Meadow Creek Coal Co.*, 263 F. 2d 52 (C. C. A. 6, 1959) cert. denied 359 U. S. 1013; *United Mine Workers of America* v. *Osborne Mining Co.*, 279 F. 2d 716 (C. C. A. 6, 1960) cert. denied 364 U. S. 881; *Gilchrest* v. *United Mine Workers of America*, 290 F. 2d 36 (C. C. A. 6, 1961) cert. denied 368 U. S. 875; *Flame Coal Co.* v. *United Mine Workers of America*, 303 F. 2d 39 (C. C. A. 6, 1962); *Sunfire Coal Co.* v. *United Mine Workers of America*, 313 F. 2d 108 (C. C. A. 6, 1963); *White Oak Coal Co., Inc.* v. *United Mine Workers of America* (Opinion May 24, 1963), ... F. 2d .... (C. C. A. 6, 1963); *Joe R. Allen et al.* v. *United Mine Workers of America* (Opinion June 26, 1963), ... F. 2d .... (C. C. A. 6, 1963).

object of the union activity was to cause Grundy to cease doing business with Gibbs with respect to both his employment contract and his trucking contract. The fact that the union may have had some object or objects other than and in addition to causing Grundy to cease doing business with Gibbs would not prevent the activity from constituting a secondary boycott insofar as Gibbs was concerned, and therefore actionable by him as such. As stated in the case of *Flame Coal Co.* v. *UMW*, 303 F. 2d 39 (C. C. A. 6, 1962).

> "This union cannot escape the charge of secondary boycott because it chose to attack on all fronts at once, claiming its desire and objective to be the organization of all involved, whether producers, transporters, or processers of coal. *United Mine Workers of America* v. *Osborne Mining Co.*, 279 F. 2d 716, 723."

Finally, upon the issue of secondary boycott it is contended by the defendant that any union activity here involved would in no event constitute an actionable secondary boycott as to Gibbs for the reason that, as mine superintendent for Grundy, he was not such an "other person" within the contemplation of Sec. 8 (b) (4) (B) as to be the object or victim of a proscribed secondary boycott, but rather he was a part of Grundy, the primary employer. The relationship of Gibbs to Grundy, namely that he was hired as mine superintendent for Grundy and as a contract coal hauler, is undisputed in the record. Therefore, whether he or is not such "other person", the ceasing of business with whom may constitute an actionable secondary boycott, is a question of law.

If the language of the statute is to be literally interpreted, then Gibbs is clearly an "other person" from Grundy, as would be any officer or employee of Grundy.

However, as stated in *Electrical Workers* v. *Labor Board*, 366 U. S. 667:

> "This provision could not be literally construed; otherwise it would ban most strikes historically considered to be lawful, so-called primary activity."

Likewise, as noted in *Seafarers International Union* v. *NLRB* (1959), 265 F. 2d 585, when read literally, the Act would outlaw picketing at the primary employer's premises so that the language must be construed in the light Congressional intent and in the light of the proviso that nothing in the Act shall be construed to make any primary strike or primary picketing unlawful.

In support of its contention that Gibbs is not such "other persor" from Grundy as to be the object of a secondary boycott for activities directed at Grundy, the defendant relies principally upon the case of *Seeley* v. *Brotherhood of Painters*, 308 F. 2d 52 (5 C. C. A., 1962). In that case the plaintiff, in one of several counts, alleged that he had a cause of action against the defendant union under 29 U. S. C. 187, in that the defendant caused the plaintiff's employer to discharge him. The Court, in holding that the count failed to state a cause of action, stated that discharging an employee did not constitute "ceasing to do business with any other person," stating further, "We do not think the relation of employer and employee, including one employed as a supervisor, is that of 'any other person' within Section 158 (b) (4)." The Court reached this conclusion on the ground that "no secondary boycott was involved in this case," which is rather unsatisfactory reasoning in that it begs the question.

The defendant relies upon other authority as requiring that the plaintiff be a "neutral" before he is entitled

to the benefit of the statutory secondary boycott action.[3] That this is not an accurate statement of law is apparent when it is recalled that 29 U. S. C. 187 (b) provides that "*whoever* shall be injured" by a secondary boycott may recover, including the employer with whom the primary dispute exists.[4] While the word "neutral" may be useful in identifying a case of secondary boycott in a clear and classical case of secondary boycott, little help is needed in identifying a clear and classical secondary boycott. The word "neutral" can be misleading in other situations, as for example where the union strikes on all fronts at once, as was the case in *Flame Coal Co.* v. *United Mine Workers of America,* 303 F. 2d 39 (C. C. A. 6, 1962), where the Court held that such union activity did not escape the charge of secondary boycott. If two employers each simultaneously has a dispute with the same union, they may be neutral as to each other's dispute, but they are in no sense neutral as to the union.

While a correct result may have been reached in each of the foregoing cases relied upon by the defendant as authority for excluding an employee or supervisor from the meaning of "other person" in Sec. 8 (b) (4) (B), the reasons given for reaching such conclusion are often unsatisfactory. Reference to the full wording of the section will more properly reveal the meaning that must necessarily be placed upon the words "other person". When it is noted that the proviso expressly excludes primary strikes and primary picketing, it is apparent that employees and supervisors of any struck or picketed primary employer who may lose their employment are

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[3] *Truck Drivers and H. Local 728* v. *Empire State Express,* 293 F. 2d 414 (5 C. C. A. 1961) cert. denied 368 U. S. 931 (1961); *Building Service Employees* v. *NLRB,* 313 F. 2d 880 (D. C. Cir., 1963); *International Brotherhood of Electrical Workers* v. *NLRB,* 181 F. 2d 34 (C. C. A. 2, 1950).

[4] See cases cited in Footnote No. 2, *supra.*

not within the meaning of "other persons" and would have no statutory action for any loss so occasioned.

It is apparent from the foregoing that Gibbs, in his capacity as mine superintendent for Grundy, would not be an "other person" as those words are used in the statute. Although, as found by the jury, an object of the picketing of Grundy was to cause it to cease employment of Gibbs, and Grundy may have been "neutral" or secondary to the dispute between UMW and Gibbs, there also clearly existed a primary dispute between UMW and Grundy. It follows that the verdict of the jury awarding damages to Gibbs upon his statutory claim for loss of employment must be set aside.

It does not necessarily follow, however that, even though Gibbs in his capacity as a mine superintendent and in his claim for loss of employment is not an "other person" from Grundy, that he is therefore in his capacity as a coal trucker and in his claim for loss of the trucking contract not an "other person" from Grundy. The evidence is undisputed that Gibbs was an independent trucker engaged in this business with and for persons and companies other than Grundy. He did not work only for Grundy in this respect. It would therefore appear that in his capacity as an independent trucker he would be an "other person" from Grundy and would be entitled to a statutory action under the secondary boycott law upon this claim.

Having determined that the jury verdict should be sustained as to the statutory cause of action for loss by Gibbs of his trucking contract, it would follow that the defendant's contention that the Court was without jurisdiction of the common law conspiracy action must fail.[5] Even though the federal statutory action should fail both

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[5] *United Mine Workers of America* v. *Meadow Creek Coal Co.*, 263 F. 2d 52 (C. C. A. 6, 1959) cert. denied 359 U. S. 1013; *Flame Coal Co.* v. *United Mine Workers of America*, 303 F. 2d 39 (C. C. A. 6, 1962).

upon the employment and the trucking claim, it cannot be said that the federal question was plainly wanting in substance. Under these circumstances, in accordance with the case of *Hurn* v. *Oursler,* 289 U. S. 238, the Court would retain jurisdiction to dispose of the non-federal common law claim.

Another series of grounds in the defendant's motion for a judgment n.o.v. or a new trial are directed toward alleged errors in the jury verdict in finding that the defendant conspired to wrongfully interfere with the plaintiff's employment contract and coal hauling contract with Grundy. It is the contention of the defendant in this regard that the evidence fails to support the jury verdict, particularly in view of the legal principles that (a) the evidence must be clear and convincing for a labor union to be held responsible in a federal court action, in view of Section 6 of the Norris-Laguardia Act; (b) a union is under no legal obligation to disavow unlawful acts of its members; (c) welfare assistance given members, including pickets, by the union does not constitute ratification of any unlawful conduct by such members or pickets; and (d) federal law has preempted the field of non-violent picketing so that no verdict could be awarded upon a state common law conspiracy charge not based on violence. The jury was correctly charged upon all of these matters. The Court is of the opinion that there is evidence in the record, when the testimony is viewed as a whole, to support the verdict of the jury in this respect. The contention that 29 U. S. C. 187 and the other provisions of the National Labor-Management Relations Act preempted the field of labor controversy or precluded any common law action of conspiracy has been decided against the UMW in several cases in this circuit, the most recent being the case of *White Oak Coal Co.* v. *United Mine Workers of America,* . . . F. 2d . . . (C. C. A. 6, decided May 24, 1963). Moreover, there was evidence of violence, threats of violence, and mass picket-

ing, any of which was such unlawful conduct as to support a verdict based upon common law conspiracy.

A further series of errors alleged by the defendant are directed to the Court's charge to the jury. It is the contention of the defendant that the Court was in error in declining a special request of the defendant relating to a requirement that a neutral exist before an actionable secondary boycott would exist. The Court has hereinabove dealt with the possible misleading nature of the word "neutral" when used in defining a Sec. 8 (b) (4) unfair labor practice. It is believed that the charge as given correctly defined the statutory claim. Moreover, the action of the Court in setting aside the jury verdict on the statutory claim of interference with the plaintiff's employment contract would render this ground of the defendant's motion moot. The other alleged errors in the charge were matters not raised at the time of the trial as required by Rule 51, Federal Rules of Civil Procedure. It is believed that in any event no error was committed in the matters complained of.

A further ground for new trial relied upon by the defendant is the alleged improper argument of the plaintiff's counsel in his closing argument. Among other remarks, counsel for the plaintiff accused the defendant of not caring a snap of the fingers for the law and of attempts to bludgeon or starve his client out of the lawsuit. The Court is of the opinion that the argument was improper. While an advocate may share his client's prejudices against an adversary, he cannot properly share them with the jury, particularly when they do not relate to any matters in evidence. However, the Court is of the opinion that the argument was not so prejudicial as to warrant a new trial, but should rather be taken into consideration by the Court upon the issue of excessiveness of the verdict.

Further grounds relied upon by defendant in its motion relate to the alleged lack of evidence on the issue of

damage and the alleged excessiveness of the verdict in this respect. The only evidence in the record that might support any recovery of damage with reference to the loss of the plaintiff's trucking contract was the plaintiff's own estimate of the profit he would have made on the contract, as set forth in Plaintiff's Exhibit No. 34, in the amount of $14,029. His actual experience in the coal trucking business reflected substantial losses, rather than profits, for preceding years. Not only is there an absence of credible evidence to support the estimate but the estimate is admittedly based upon carrying loads substantially in excess of the permissible weight limits applicable to the plaintiff's trucks under the laws of Tennessee. The issue here is not the validity or invalidity of the coal hauling contract, or the right of a third party, the UMW, to assert its invalidity, as apparently argued in the plaintiff's brief. The issue here is as to the probative value of the evidence of the loss of prospective profits when based upon prospective violation of truck weight laws. The Court is of the opinion that such evidence has no probative value.[6] Under these circumstances the record is devoid of any evidence upon which a jury might return a verdict awarding any damages for loss by the plaintiff of his trucking contract and the defendant's motion for a directed verdict upon this issue made at the conclusion of the evidence should have been sustained.

With respect to the verdict awarding damages unto the plaintiff for loss of his employment contract, the Court is of the opinion that there is evidence in the record upon which a verdict might be sustained. However, without here reviewing the evidence relating to damages sustained by reason of loss of the employment contract, other than to note that the employment con-

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[6] *Shelley* v. *Hart*, 297 P. 82 (Calif., 1931). See also 25 C. J. S., Damages, Sec. 42 (B) and 15 Am. Jur., Damages, Sec. 158, 159.

tract was terminable at will by either party, the Court is of the opinion that the verdict of the jury upon this issue is clearly excessive to the extent of $30,000. Likewise in reviewing the evidence and reflecting upon the argument of the plaintiff's counsel to the jury, the Court is of the opinion that the jury verdict upon the issue of punitive damages is clearly excessive to the extent of $55,000. A remittitur in the sum of $30,000 upon the issue of loss of the plaintiff's employment contract and in the sum of $55,000 upon the issue of punitive damages is therefore suggested, or otherwise a new trial will be ordered.

The Court has reviewed Grounds 10, 11, 12, and 13 of the defendant's motion relating to the admissibility of various items of evidence upon the trial, and is of the opinion that these grounds are without merit and should be overruled.

It therefore results that the verdict of the jury in favor of the plaintiff on the issue of loss of the plaintiff's employment contract by reason of a statutory secondary boycott will be set aside. The verdict of the jury awarding damages unto the plaintiff on the issue of loss of the plaintiff's trucking contract by reason of both a statutory secondary boycott and a common law conspiracy will be set aside. The defendant's motion for a judgment n.o.v. upon these issues should be sustained. Unless the plaintiff shall agree to accept a remittitur of $30,000 in the jury verdict on the issue of damages by reason of loss of the plaintiff's employment contract as a result of a common law conspiracy and to accept a remittitur of $55,000 in the jury verdict on the issue of punitive damages, the Court believes that these issues should be submitted to another jury and a new trial will be ordered.

An order will enter accordingly.

FRANK W. WILSON,
United States District Judge.

APPENDIX B

29 USCA Sec. 106 (Sec. 6 of the Norris-LaGuardia Act)

§106: RESPONSIBILITY OF OFFICERS AND MEMBERS OF ASSOCIATIONS OR THEIR ORGANIZATIONS FOR UNLAWFUL ACTS OF INDIVIDUAL OFFICERS, MEMBERS, AND AGENTS

No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof. Mar. 23, 1932, c. 90, § 6, 47 Stat. 71.

Labor Management Relations Act, 1947 (29 USCA)

§158. UNFAIR LABOR PRACTICES

(a) It shall be an unfair labor practice for an employer—

*****

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

*****

(b) It shall be an unfair labor practice for a labor organization or its agents—

*****

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work

on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

*****

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

*****

§ 187. Boycotts and Other Unlawful Combinations; Right to Sue; Jurisdiction; Limitations; Damages

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title. As amended Sept. 14, 1959, Pub. L. 86-257, Title VII, § 704(e), 73 Stat. 545.

(b) Whoever shall be injured in his business or property by reason or [1] any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit. June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title III, § 303, 61 Stat. 158.

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[1] So in original. Probably should read "of."

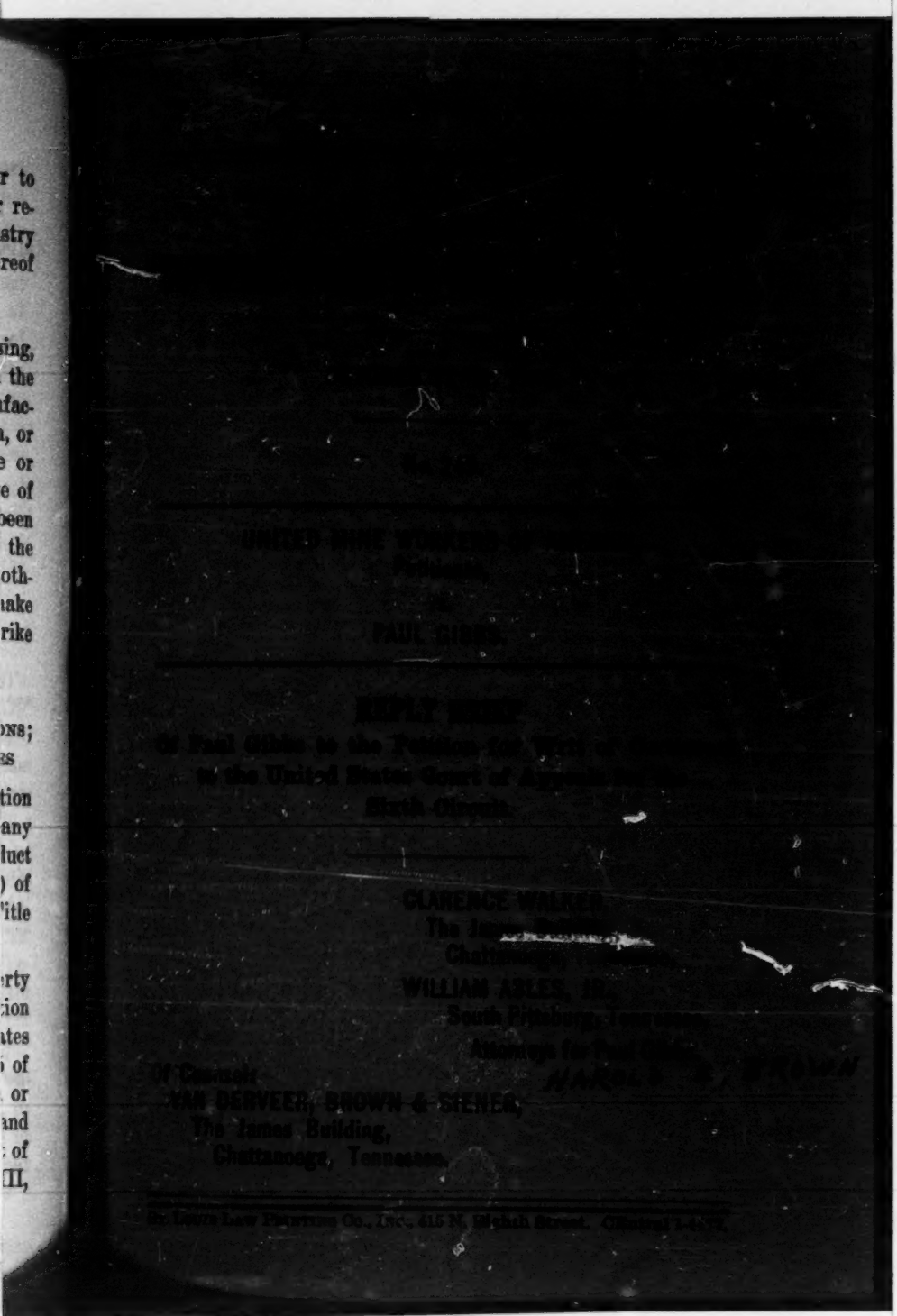




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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 243.

UNITED MINE WORKERS OF AMERICA,
Petitioner,

vs.

PAUL GIBBS.

REPLY BRIEF

Of Paul Gibbs to the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

STATEMENT OF THE CASE.

Respondent accepts the statements of the Petitioner (herein referred to as UMW) as to the procedural history of the case.

COUNTER STATEMENT OF FACTS.

Respondent cannot accept the statement of facts contained in petitioner's brief as respondent believes that in the case at bar the concerted activities on the part of the UMW was to intimidate and create wide spread fear and tension throughout the entire area. This was accomplished by acts of violence, threats of violence and coercion over the whole area. To show some of these activities the acts of violence and threats of violence should be shown. Our counter statement of facts is contained in Appendix I to this brief.

ARGUMENT.

QUESTION 1.

"Where a parent union assumes the direction of picketing theretofore commenced by a local union and insists upon and achieves order, is the parent union liable under state law for violence committed prior to the parent union's involvement?"

The Sixth Circuit's decision properly implements the doctrine of the federal preemption and, as such, is in full harmony with the decisions of this Court, including **Youngdahl v. Rainfair, Inc., 355 U. S. 131 (1957); San Diego Building Trades Council v. Garmon, 369 U. S. 236 (1959),** and **Local 20, Teamsters Union v. Morton, 377 U. S. 252 (1964).** The finding that the UMW was liable was wholly consistent on the basis of violence or "threatened violence" under the Rainfair and Morton decisions.

This question on labor conduct was answered by the Sixth Circuit fully and totally consistent with the National Labor policy. This decision does not thwart a union's legitimate efforts to curve excessive conduct on the part of those it is the union's duty to represent.

In the instant case UMW was not faced with the choice of abandoning its members or restoring order. The Sixth Circuit did not find that the UMW had a choice but on the contrary found that the UMW took advantage of and proceeded to continue the initial advantage from the violence with around the clock picketing.

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> "The aura of violence remains to enhance the effectiveness of picketing. Certainly there is a threat of violence when the man who has just knocked me down from my steps continues to stand guard at my front door."

There are no analogous circumstances between this case and **NLRB v. Mayer** as that matter dealt only with individual securing a change of union representation. It in no way was based on the employer having initiated or assisted in the violence change of the representative.

The imposition of liability on the apparent Union in these circumstances and under facts in this case does not require the Union to forego its right to picket in an orderly way because of the prior violence. The factual situation combined with the initial violence showed very clearly, and was found by the jury and the Court of the Sixth Circuit not only violence but "threats of violence", making said decision wholly and totally consistent with the preemption question of the **Garmon** and **Morton** cases. The acts and conduct and over-all picture are fully consistent with past cases.

The Sixth Circuit's imposition of liability does not hold grave questions of preemption and union responsibility which this Court has not had occasion to consider, but on the contrary is wholly and totally consistent with the past decisions of this Court.

We submit these questions have already been settled by this Court.

QUESTION 2.

"Where an appeal to prejudice in jury argument on matters unrelated to the evidence was found to have materially affected the verdict, was it proper, in light of the indiscriminate and extensive nature of the appeal to prejudice, to cure the verdict by remittitur rather than a new trial, on the theory that the appeal to prejudice was 'calculated to influence the size of a favorable verdict for the plaintiff without affecting the determination on the merits?' "

The petitioner's characterization of the improper argument of respondent's counsel is not as prejudicial or vicious as petitioner asserts. The District Court fully realized that a case such as this case involves one of the most sensitive areas of the law on one in which many people have strong feelings. This is most specifically shown by the District Court's last cautionary instruction before the jury began its deliberation (515a-516a). Whether misconduct in a trial of a cause of action is of such a nature that a fair and impartial verdict cannot be reached rests primarily in the judicial discretion of the lower Court. In view of the cautionary instructions given by the District Court at the time of the petitioner's objections, counsel's prompt abandonment of the improper (argument) (487a) and the cautionary instruction that the case should be decided by the jury dispassionately, with complete impartiality and without any feeling of prejudice, sympathy, bias or favor, and to decide the case strictly on the basis of the evidence as it had been given the jury and on the law as the District Court had instructed, removed any improper effect the argument might have produced. **Maryland Casualty Co. v. Kelly, 4th Cir., 45 F. 2d 788, 1930.**

The District Court, in ruling on petitioner's motion for a new trial, was of the opinion that the remarks of counsel were not prejudicial to the rights of petitioner. The Court felt counsel's argument improper but when viewed on the record as a whole, was not prejudicial. Although remarks of counsel may be improper, of questionable propriety or reprehensible, such remarks under all circumstances, must be prejudicial to the rights of the other party to require reversal or granting a new trial.

Argument that $25,000.00 meant nothing to defendant. **Sheffield Steel Corp. v. Vance, 236 F. 2d 938, C. C. A. 8th, 1956.** If jury found for plaintiff,

they would in effect accuse master and mate of being criminally negligent. **Morron v. Atlantic Refining Co., 176 F. 2d 313 (C. C. A. 3, 1949).** Plaintiff's counsel's reference to a truck as "Monster" or "Battle Ship". **Associated Petroleum Carriers v. Beall, 217 F. 2d 607 (C. C. A. 5, 1955).** Reference to plaintiff—"How Small", "How Cheap". **Berman v. Anderson, 232 F. 2d 56 (C. A. D. C. 1956).** "The casualties in war are provided for by a grateful Government. I leave it to you to say as an illustration of industry and its gratitude for one whose duty—" **Fleming v. Husted, 164 F. 2d 65 (C. C. A. 8th, 1947),** cert. denied **333 U. S. 843, 68 S. Ct. 661, 92 L. Ed. 1127.** Argument picturing defendant as friend of poor against defendant who was pictured as exploiter of the defenseless. **Show Warehouse Co. v. Southern Railway Co., 294 F. 2d 850 (C. C. A. 5th, 1961),** cert. denied **369 U. S. 850, 82 S. Ct. 933, 8 L. Ed. 2d 9.** Characterization of defendant as a monster. **Smith v. McNulty, 293 F. 2d 924 (C. C. A. 5th, 1961).**

The District Court and Sixth Circuit viewed the argument of counsel in a different perspective than petitioner. The District Court was of the opinion that the jury's verdict was excessive in view of the evidence in the record relating to damages and not as a result of mistake, caprice, sympathy, prejudice or other improper motive on the part of the jury (in determining liability). The question of excessiveness of verdict is primarily for the trial Court and will not be disturbed on appeal unless the verdict is so grossly excessive that the denial by trial Court of a motion for a new trial constitutes an abuse of discretion. **Trowbridge v. Abrasive Company of Philadelphia, 190 F. 2d 825 (C. C. A. 3, 1951).** The District Court in the exercise of its duty and power when of the opinion the amount of the verdict was against the weight of the evidence, con-

ditioned the denial of a new trial by suggesting a remittitur. By this proper exercise of duty and power, the error of excessiveness in the verdict was cured. **International Paper Co. v. Busby, 182 F. 2d 790 (C. C. A. 5, 1959); White Oak Coal Co. v. UMW, 318 F. 2d 591 (C. C. A. 6, 1963).**

It is respectfully submitted that the size of the verdict for compensatory and punitive damage is not indicative of bias, prejudice and passion, on the part of the jury resulting from counsel's argument. The District Court cured the excessiveness of verdict by proper performance of duty and exercise of its power when the District Court was of the opinion the amount of the verdict was against the weight of the evidence, to condition the denial of a new trial by suggesting a remittitur.

QUESTION 3.

"In an action for damages against a labor union in which plaintiff alleged that acts which occurred during labor disputes constituted a violation of Section 303 of the Act and a violation of state law, would the District Court have pendent jurisdiction of a non-federal claim?"

This is a suit to recover damages from the petitioner for injury and damage sustained by the respondent as a result of petitioner's alleged unlawful violation of the Secondary Boycott Provision of the Labor Management Relations Act (29 U. S. C. A. 187) and the unlawful interference, by means of an unlawful conspiracy, with respondent's right to engage in a lawful employment and business under the laws of the State of Tennessee. The complaint alleges two grounds of recovery, one Federal ground and one State ground, but only a single cause of action (10a-11a).

The doctrine of pendent jurisdiction is a well settled principle of law, being first announced in **Siler v. L. & N.**

Railroad Co., 213 U. S. 175, 29 S. Ct. 451, 53 L. Ed. 753 (1909), and reaffirmed and explained in **Hurn v. Oursler, 289 U. S. 238, 47 S. Ct. 586, 77 L. Ed. 1148 (1933)**, clearly establishing that where two distinct grounds in support of a single cause of action are alleged, and the Federal ground is not plainly wanting in substance, the Federal Court, even though the Federal ground be not established, nevertheless has jurisdiction to dispose of the case on non-federal grounds.

In **Levering & Garrigues Co. v. Morrin, 289 U. S. 103, 47 S. Ct. 600, 77 L. Ed. 1062 (1933)**, this Honorable Court very positively stated that the question of jurisdiction of a court is not based upon the facts developed in the case, but upon the allegations of the complaint.

> "If the bill or complaint sets forth a substantial claim, a case is presented within the Federal jurisdiction. However, the Court upon consideration, may decide as to the legal sufficiency of the facts alleged to support the same."

and also,

> "The question of jurisdiction, as thus limited, is to be determined by the allegations of the bill, and not by the facts as they may turn out, or by decisions of the merits. **Mosher v. Phoenix, 287 U. S. 29, 53 S. Ct. 67, 77 L. Ed. 148**, and cases cited."

In **Bell v. Hood, 327 U. S. 678, 66 S. Ct. 773, 90 L. Ed. 939 (1946)**, this Honorable Court said:

> "Jurisdiction therefore is not defeated * * * by the possibility that the averment might fail to state a cause of action on which the petitioner could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of

> jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and * * * must be decided after * * * the Court has assumed jurisdiction over the controversy."

The District Court either had or did not have jurisdiction to hear and consider this cause, which case must be decided as of the time when the action was filed. **Mullen v. Torrence, 9 (Wheat.) 537, ... L. Ed. 154 (1924); St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U. S. 283, 58 S. Ct. 586, 82 L. Ed. 845 (1938).** If jurisdiction exists it is not a contingent or a partial one. Having taken jurisdiction in the case, jurisdiction continued in the Court to enable it to dispose of all issues raised by the pleadings. **Ober v. Gallagher, 93 U. S. 199, 23 L. Ed. 829 (1876).**

Not only did the complaint as amended allege a violation of the Secondary Boycott Provisions of the Labor Management Relations Act, but it also alleged a clear violation of Tennessee Common Law. Both grounds of recovery present only one cause of action. The identical facts or substantially identical facts will support both the local and federal grounds of recovery.

The fundamental difference between "cause of action" and "grounds of recovery" has been explained by this Honorable Court on many occasions. **Hurn v. Oursler,** *supra*; **Levering & Garrigues Co., et al. v. Morrin et al.,** *supra*; **Baltimore Steamship Company v. Phillips, 274 U. S. 316, 47 S. Ct. 600, 71 L. Ed. 1069 (1927); American Fire & Casualty Co. v. Finn, 341 U. S. 6, 71 S. Ct. 534, 95 L. Ed. 702 (1951).** The respondent is not permitted to split his cause of action and file an action in Federal Court for violation of Federal law and also file an action in a State Court for violation of State law, alleging the same facts and violation of the same right as a ground for

recovery in both suits. **Baltimore Steamship Co. v. Phillips**, *supra*; **Globe & Rutgers Fire Insurance Co. v. Cleveland, 162 Tenn. 83 (1930); Saddler v. Apple, 28 Tenn. 342 (1848); Mobile & Ohio Railroad Co. v. Mathews, 115 Tenn. 172 (1905).**

The District Court and the Sixth Circuit did not err in their ruling that the serious acts of violence, threats of violence and mass picketing were not protected activities under the Federal law. The cases cited by petitioner are cases where there was peaceful picketing and no violence, or if violence, as in **United Steel Workers of America v. N. L. R. B., 376 U. S. 483, 84 S. Ct. 899, ... L. Ed. 2d ... (1964)**, it was not of such a serious nature as the violence and tortious conduct as found in the case at bar, and **International Union, United Automobile, Aircraft and Agricultural Implement Workers v. Russell, 356 U. S. 634, 78 S. Ct. 932, 2 L. Ed. 2d 1030 (1958); United Construction Workers v. Laburnum Construction Corp., 347 U. S. 656, 74 S. Ct. 833, 93 L. Ed. 1025 (1954).** In **San Diego Building Trades Council v. Garman, 359 U. S. 236, 247, 79 S. Ct. 773, 781, 3 L. Ed. 2d 775 (1959)**, state jurisdiction to award compensatory and punitive damages for violent union activities, was reaffirmed, although not applicable to the decision of that case.

> "It is true that we have allowed the States to grant compensation for the consequences, as defined by the traditional law of torts, or conduct marked by violence and imminent threats to the public order. International Union, United Automobile, Aircraft and Agricultural Implement Workers, etc. v. Russell, 356 U. S. 634, 78 S. Ct. 932, 2 L. Ed. 2d 1030; United Construction Workers, etc. v. Laburnum Const. Corp., 347 U. S. 656, 74 S. Ct. 833, 98 L. Ed. 1025."
>
> "State jurisdiction has prevailed in these situations because the compelling state interest, in the scheme of our federalism, in the maintenance of domestic

peace is not overridden in the absence of clearly expressed congressional direction. * * *'' (359 U. S. 247, 79 S. Ct. 781.)

United Steel Workers of America v. N. L. R. B., *supra*, is not in conflict with the Sixth Circuit. Violent (mass) picketing, (even) if "primary", and not violative of Section 8 (b) (4), does not legalize it under other laws, state or federal. The extension of extreme violent activities and threats of violence to a front remote from the immediate dispute, having as an objective of such violence and mass picketing the interference with business intercourse not connected with ordinary operations, does not escape the secondary boycott ban.

The exact theory as applied in the case at bar has been applied and followed in the following cases: **UMW v. Meadow Creek, 6th Cir., 263 F. 2d 52,** cert. denied, **359 U. S. 1013, 79 S. Ct. 1149, 3 L. Ed. 2d 1038 (1959); Flame Coal Co. v. UMW, 6th Cir., 303 F. 2d 39,** cert. denied; **Osborne Mining Co. v. UMW, 6th Cir., 279 F. 2d 716,** cert. denied, **364 U. S. 881; Gilchrist v. UMW, 6th Cir., 290 F. 2d 36,** cert. denied, **368 U. S. 875; Price v. UMW, 6th Cir., 336 F. 2d 771,** cert. denied, ... **U. S.** ..., **85 S. Ct. 899,** ... **L. Ed. 2d (1965).**

It is submitted the case at bar is a proper case for the application of the doctrine of pendent jurisdiction. The respondent had only one cause of action for the violation of a single right but had two grounds of recovery, one Federal and one State. The Federal ground was not plainly wanting in substance, and the District Court had jurisdiction to hear and determine the case on both Federal and State grounds.

The Federal law has not pre-empted the states from granting compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence, threats of violence, mass picketing and im-

minent threats to the public order. In the event an illegal secondary boycott be not established under the facts as proven at the trial, the District Court had jurisdiction to determine all issues of the case, including those under State law.

QUESTION 4.

"Where a verdict of damages is based upon a finding of liability under Section 303 of the Act and state common law and where damages recoverable under the two theories are not necessarily the same and it is impossible to ascertain to what extent the jury relied on one theory or the other in assessing the award of damages, and where it is found that the action was erroneously submitted to the jury on the Section 303 claim, may the verdict be upheld on the sole basis of the common law claim?"

The District Court was fully aware of the many difficulties of trying a case as this, and the danger of error which would result in having to try the case a second time. The District Court in an effort to avoid error decided to submit special interrogatories to the jury to answer the fact issues upon which the jury verdict would depend. On November 13, 1962, at a conference in chambers the District Judge discussed the special request to charge and the matter of the form of verdict (67a). Subsequently, and before the argument to the jury, counsel for both parties were given the proposed special interrogatories for review and suggestions. The petitioner did not object to the interrogatories as not correctly presenting the issues the jury was called upon to answer or on any ground before the case was submitted to the jury, the petitioner did not poll the jury when the verdict was read in open court and did not move at that time or before the jury was dismissed that any alleged inconsistency in the answers be resubmitted to the jury for clarification. The

respondent believes that the petitioner waived any alleged error and definitely did not preserve its right to allege this as error by its failure to act at the appropriate time. **Safeway Stores v. Dial, 311 F. 2d 595, 5th C. C. A., 1963; Penn v. Glenn, 265 F. 2d 911, 6th C. C. A., 1959.**

Rule 49 (b) of the Federal Rules of Civil Procedure makes specific provisions for the course to be followed where there is inconsistency between the general verdict and the answer to interrogatories. If there be any inconsistency between the verdict and the jury's answer to interrogatories it is the duty of the Courts to harmonize the answers, if possible under a fair reading of the Court's instructions and the special verdicts. **Gallick v. B. & O. Railroad Co., 372 U. S. 108, 83 S. Ct. 659, 9 L. Ed. 2d 618 (1963).** A review of the Court's charge and the answer to interrogatories would definitely find the answers consistent with the verdict (31a-34a, 509a-513a).

The principles controlling the present question are not in conflict.

> "Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way." **Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U. S. 355, 364, 82 S. Ct. 780, 786, 7 L. Ed. 2d 798.** We therefore must attempt to reconcile the jury's findings, by exegesis if necessary, as in **Arnold v. Panhandle & S. F. R. Co., 353 U. S. 360, 77 S. Ct. 840, 1 L. Ed. 2d 889; McVey v. Phillips Petroleum Co., 288 F. 2d 53 (C. A. 5th Cir.); Morris v. Pennsylvania R. Co., 187 F. 2d 837 (C. A. 2d Cir.) (collecting authorities),** before we are free to disregard the jury's special verdict and remand the case for new trial."

Respondent submits that there is not any inconsistency between the jury's verdict and its answer to interroga-

tories. If the petitioner questions that the interrogatories did not correctly present an issue or issues to the jury, or relates to an issue which could have been clarified by the jury before it was dismissed, the petitioner, by not objecting at the time, failing to submit interrogatories to the court to be presented to the jury and failure to move to have the answers clarified resulted in a waiver by petitioner. A review of the District Court's instructions and the jury's answer to the interrogatories does not show any real inconsistency as claimed by petitioner.

CONCLUSION.

The respondent respectfully submits that the Court of Appeals properly affirmed the District Court's action and no significant question is presented by the petition. Accordingly, the respondent prays that the petition for writ of certiorari be denied and make final the judgment of the court below.

Respectfully submitted,

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APPENDIX I.

COUNTER STATEMENT OF FACTS.

Respondent, Paul Gibbs, for more than thirty-two (32) years prior to August 15, 1960, since he was fifteen years of age, had been engaged in the coal, or coal mining, or coal hauling business (89a).

On August 12, 1960, Paul Gibbs was employed by Grundy Mining Company as mine superintendent at the starting salary of Six Hundred ($600.00) Dollars per month and in the capacity of an independent operator was granted a coal hauling contract to haul the coal produced at Gray's Creek Mine at a price of seventy-eight (78¢) cents per ton (93a).

On Saturday, August 13, 1960, Waldon Schrum received information of the proposed opening of the Gray's Creek Mine by Paul Gibbs in Grundy Mining Company (457a). Waldon Schrum was the president of Local 5881, and he immediately tried to contact George Gilbert, District 19 representative, to tell him the information and advise him of a called meeting of Local 5881 for Sunday, August 14, 1960 (465a, 457a).

On August 15, 1960, several members of Local 5881 went to the entrance of the Gray's Creek work site where they met the men employed by Grundy and persuaded them not to attempt to commence work. The persuasion being aided by a display of fire arms among the members of Local 5881 (99a-101a and 151a).

On August 16, 1960, a substantial number of men employed by Grundy reported to the mine site where they were met by a crowd, numbering from forty (40) to one hundred fifty (150) men, a large number of whom were carrying various types of fire arms, who again persuaded the men not to attempt to commence work. The per-

suasion, at this time, was brought home to the employees when one of their vehicles was fired upon and hit by one of the members of the mob. Paul Gibbs' truck was stopped as he drove along the Pocket Road when it reached the intersection of Gray's Creek by eight (8) to ten (10) men who ran along in front of the truck with guns raised to their shoulders and pointed at Mr. Gibbs. One of the members of the group opened the truck door, grasped Mr. Gibbs' arm and attempted to pull him from the truck while the remaining men maintained their weapons to their shoulders. Mr. Gibbs was detained for approximately two (2) hours during which time he was apprehensive as to who was going to hit or shoot him first. Later, he was escorted by a motorcade to the intersection of Coal Valley Road and Highway No. 108, a distance of approximately two (2) miles from the Gray's Creek entrance where he witnessed the beating of Johnny Cain and the burning of his brief case and other papers. Gibbs and Cain were escorted from this area through Palmer, Tennessee, up to the intersection of Highway No. 108 and Highway No. 185 before the mob agreed to release Mr. Gibbs (103a-110a and 151a-154a).

On August 17 or 18, 1960, a mob or a crowd of one hundred (100) to one hundred twenty-five (125) men gathered near the office of Tennessee Consolidated Coal Company, parent of Grundy Mining Company, at Palmer, Tennessee. Two (2) officers of the Company were harassed by the crowd, some of whom were carrying weapons. One of the Company officers was manhandled and cursed, and one of the crowd pointed a 30-30 carbine rifle at the officer as he was getting in his car. Attempts were made to block their car so they could not leave, and finally when they were about to leave, two (2) cars pulled in side by side in front of their car so they were not allowed to pass (232a, 247a-248a).

On August 22, 1960, a visitor to the area asked a group of men picketing near Highway No. 108 for George Gilbert, after recognizing Gilbert's car at the scene. George Gilbert came out of the woods and told the visitor he could not go down the Pocket Road, but suggested another route to the visitor's destination along which he would observe some of Gilbert's men, whom he was told to tell that it was alright to pass (159a-162a).

After these events, Paul Gibbs was forced to turn over the operation of his mine to one of his employees, and within a week or ten (10) days after the violence of August 15 and 16, a sack was burned at the mouth of the mine, which could suffocate workers in the mine if they stayed there long enough; and an exhaust fan belt which was cut several times (452a-454a).

Gray's Creek area is one of the best coal areas in the Sewanee coal scene, and it was contemplated that Grundy Mining Company would eventually open around ten (10) mines in the Gray's Creek area (201a, 215a). That after the violence and activities of August 15 and 16, and thereafter, Tennessee Consolidated Coal Company or Grundy Mining Company would not hire Paul Gibbs, because, had Paul Gibbs been hired, none of the mines would have been open today (206a). Tennessee Consolidated Coal Company would not execute leases of prime coal bearing lands to Mr. Gibbs, because it would have been a waste of time as he would never have had the opportunity by himself to mine coal (214a-215a).

It was shown at the trial that George Gilbert told Paul Gibbs, "I want you to keep your damn hands off of that Gray's Creek area, and tell that Southern labor union that we don't intend for you to work that mine" (128a). George Gilbert also made statements to others in regard to Paul Gibbs that "Hell, we can't let that go

on" and that "Paul was trying to bring in the other union" and that he (Gilbert) said, "He ain't going to get by with it" (219a). "Paul was trying to bring in the Southern labor union into the coal field" and he (Gilbert) said, "The union won't let him do it." "They have ways of preventing him from doing it," "and he seemed to think Gibbs was going to have to go," "and he said he had friends in high places that could move him out of the mine business" (257a-258a).

After this threshold success, picketing was maintained for a period of nine (9) months, seven (7) days a week, twenty-four (24) hours a day, at the entrance to the mine area (383a, 332a-333a).

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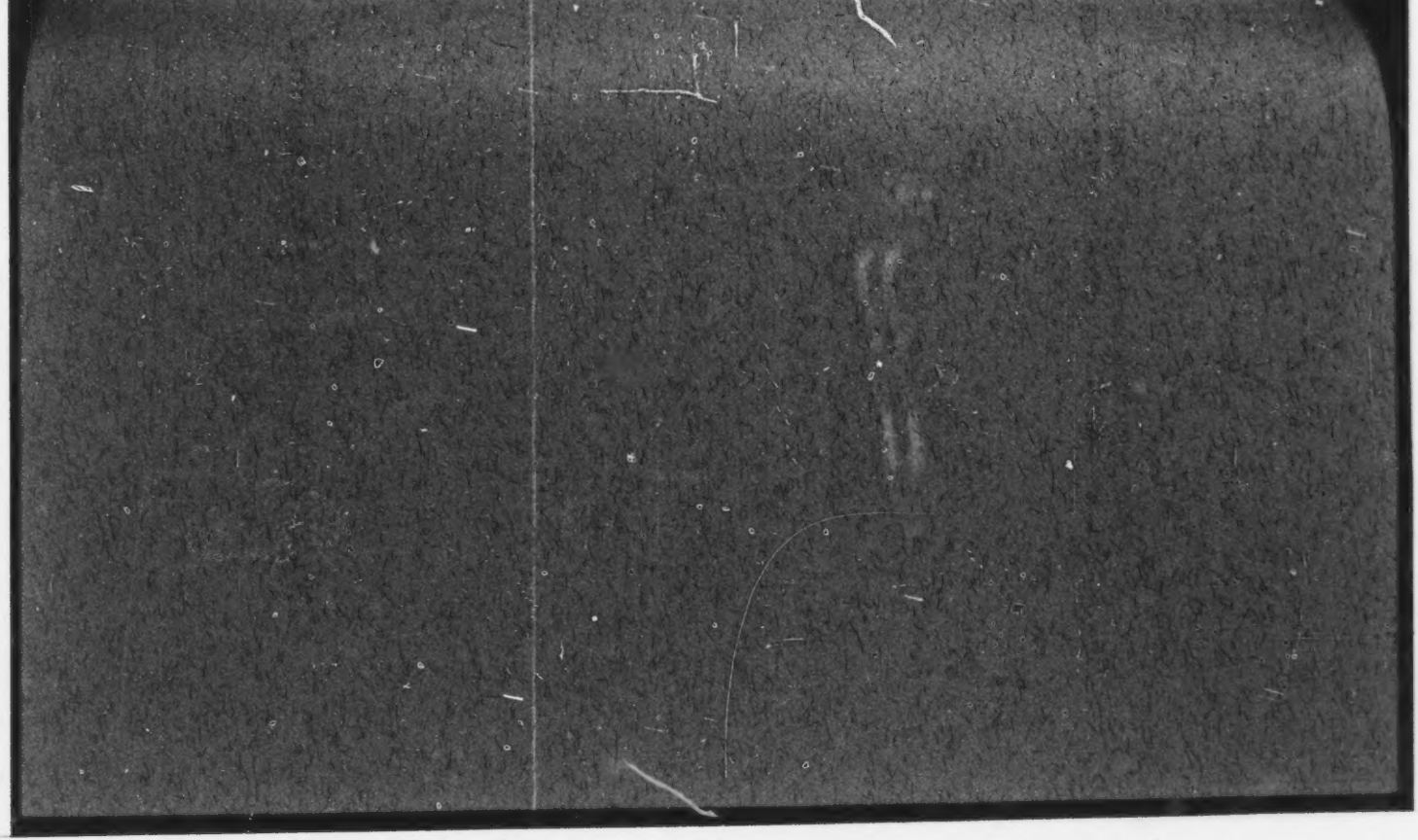
PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

REPLY TO THE COUNTER-STATEMENT OF FACTS AND TO GIBBS' ARGUMENT OF QUESTION ONE

The issue presented by Question One is UMW's responsibility for picket line misconduct, which is discussed in Gibbs' Counter Statement of Facts and in Gibbs' argument of Question One. The Sixth Circuit

predicated UMW's liability in part on a finding that UMW Field Representative Gilbert was present at the time of the misconduct. The clearly erroneous nature of this finding is discussed in UMW's petition at pages 9-11, and particularly in footnote 6. *It is noted that nowhere in Gibbs' reply is this crucial finding of the Sixth Circuit defended or even mentioned.* Contrary to the Sixth Circuit's finding, Gilbert was not present on the occasion of the misconduct, as Gibbs has tacitly admitted heretofore.

REPLY TO GIBBS' ARGUMENT OF QUESTION TWO

Gibbs states at page 4 of his brief that "The Court felt counsel's argument improper but when viewed on the record as a whole, was not prejudicial." Gibbs states at page 5 that "The District Court was of the opinion that the jury's verdict was excessive in view of the evidence . . .".

Clearly this is a misconception of the decisions of both the District Court and the Court of Appeals. The District Court expressly found the closing argument an appeal to prejudice (56a) and not only in light of the evidence *but because of that argument* the Court suggested a remittitur in the punitive award. The Court of Appeals, in considering the District Court's opinion, agreed that the argument was improper and that it related to the size of the verdict "without affecting the determination on the merits". These statements cannot be reconciled with Gibbs' assertion that the remarks were improper but not prejudicial.

Because the remarks of counsel were prejudicial and were found to have had an adverse effect on the jury and its verdict, UMW submits that it is entitled to a

new trial at which all issues may be considered and determined free from an appeal to prejudice.

REPLY TO GIBBS' ARGUMENT OF QUESTION FOUR

UMW contends that the verdict for damages, which was upon two theories, may not be sustained where it was subsequently determined that one theory was erroneous and where it is impossible to determine which theory, or to what extent each theory prompted the verdict on the damage issue.

Gibbs contends that UMW has waived its right to assert this question in that it did not object to the interrogatories as not correctly presenting the issues.

The record shows, however, that the District Court prepared this verdict form on its own motion, and took pains to explain to Gibbs' counsel, who had expressed preference for a general verdict, why it was to his advantage to have a special verdict on the issue of liability. (The District Court's remarks to Gibbs' counsel appear in the Certified Record immediately following p. 521a, marked "Appendix A" and are also appended hereto as Appendix A for the convenience of the Court).

The cases cited by Gibbs, *Safeway Stores, Inc.* v. *Dial,* 311 F. 2d 595 (5th Cir. 1963) and *Penn* v. *Glenn,* 265 F. 2d 911 (6th Cir. 1959) are not in point, for the inconsistency in the verdict does not arise simply from the verdict form or the verdict as rendered. The inconsistency became apparent after the District Court set aside one of the two grounds on which the general verdict for damages was based. When the balance of the verdict is considered apart from that portion which was found to be contrary to the law, the rule of *Sunkist Growers, Inc.* v. *Winckler and Smith Citrus Products*

Co., 370 U.S. 19, becomes applicable and entitles UMW to a new trial.

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APPENDIX A

The following is a part of the discussion between the Court and counsel on the special verdict form. The court is speaking to Mr. Van Derveer, attorney for the plaintiff (Appendix E, pp. 30-31, Chambers Hearing of November 13, 1962):

"The Court: Well, here's your problem, Joe. Now, I realize that you do not look with favor of special issues, but I think that you're so familiar with the state practice that you overlook the fact that in the federal rule—the federal court the rule is different. And that is one the—in the federal courts, a general verdict—in the state courts, a general verdict if it can be supported by any theory is supported. In the federal courts where it's a federal question involved, a general verdict unless it can be supported by all theories, has to be reversed and sent back. So we're going to have to work out special issues here that will tie down the issues sufficiently that we know what the jury has decided. If you don't, and you get up to the court of appeals on the question, then if there is any theory upon which there is no evidence, then the general verdict must be reversed and sent back. Now, I don't know whether you've been aware of the difference in that respect or not, but in any event, that seems to be the federal rule. And for that reason, it's going to be highly desirable, if we're going to get this law suit settled once and for all and not have to retry it, possibly, to get these special issues pinned down. And one issue is which one of these things is it that the defendant committed. Now, I can submit to the jury all three of them, namely that the defendant—whether the defendant did or did not engage in this, whether the defendant did or did not induce, encourage, whether the defendant did or did not threaten or coerce.

"Mr. Van Derveer: Well, I thought your Honor, of course, was referring to the charge, but your Honor is also referring to the charge and the special issues.

"The Court: What I have in mind—both of them . . .

"Mr. Van Derveer: Now, it seems to us that on the special issue, that if that is the intent of the Court, that it should be just in the exact words of the statute. Did the union quote 'engage in, induce or encourage' . . .

"The Court: Well, I think we are going to have to submit those issues separately, because suppose I submitted engage in, induce or encourage, and then the jury comes back and finds 'Yes.' And then suppose when they examine the proof carefully, or the Court of Appeals examines the proof, they say well, now there is evidence which you might hold that they induced or encouraged, but there is no evidence that they engaged in. So therefore, we'll have to send this case back for re-trial.

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IN THE

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OCTOBER TERM, 1965

No. 243

UNITED MINE WORKERS OF AMERICA, *Petitioner*

v.

PAUL GIBBS, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

PETITIONER'S BRIEF

OPINIONS BELOW

The Sixth Circuit's[1] opinion (R. 524-540) is reported at 343 F. 2d 609 (1965).

The District Court's[2] opinion on Petitioner's motion to dismiss (R. 24-30a) is unreported. Its opinion on Petitioner's motion for judgment N.O.V. or a new trial (R. 42-58a) is reported at 220 F. Supp. 871 (E.D. Tenn., 1963).

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[1] Reference is to the United States Court of Appeals for the Sixth Circuit.

[2] Reference is to the United States District Court for the Eastern District of Tennessee, Southern Division.

JURISDICTION

The Sixth Circuit's judgment was entered April 6, 1965 (R. 540). Petition for a writ of certiorari was filed June 10, 1965, and granted October 11, 1965 (R. 541). This Court has jurisdiction under 28 USC, Sections 1254(1) and 2101(c).

QUESTIONS PRESENTED

1. In an action for damages against a labor union in which plaintiff alleged that acts which occurred during a labor dispute constituted a violation of Section 303 of the Labor Management Relations Act, 1947, and a violation of state law, did the District Court have pendent jurisdiction of the non-federal claim?

2. Where in the course of a labor dispute, a parent union assumes the direction of picketing theretofore commenced by a local union notwithstanding the doctrine of federal preemption, and insists upon and achieves order, is the parent union liable under state law for prior violence, in the absence of clear proof of its participation in or authorization of such violence, or its ratification thereof after actual knowledge of the violence?

3. Where an appeal to prejudice in jury argument on matters unrelated to the evidence was found to have materially affected the verdict, was it proper, in light of the indiscriminate and extensive nature of the appeal to prejudice, to cure the verdict by remittitur rather than a new trial, on the theory that the appeal to prejudice was "calculated to influence the size of a favorable verdict (for the plaintiff) without affecting the determination on the merits"?

4. Where a verdict of damages is based upon a finding of liability under Section 303 of the Labor Management Relations Act, 1947, and state common law, and where damages recoverable under the two theories are not nec-

essarily the same and it is impossible to ascertain to what extent the jury relied on one theory or the other in assessing the award of damages, and where it is found that the action was erroneously submitted to the jury on the Section 303 claim, may the verdict be upheld on the sole basis of the common law claim?

STATUTES INVOLVED

The statutory provisions involved are Sections 8(b)(4) and 303 of the Labor Management Relations Act, 1947, as amended, 61 Stat. 158, 73 Stat. 545, 29 USC §§ 158(b)(4) and 187; and Section 6 of the Norris-LaGuardia Act, 47 Stat. 71, 29 USC § 106.[3]

STATEMENT OF THE CASE

A. THE KIND OF ACTION AND THE DECISIONS AND JUDGMENTS OF THE DISTRICT COURT AND COURT OF APPEALS

Respondent, Paul Gibbs, a resident of Tennessee, instituted suit in the District Court against United Mine Workers of America[4] for $250,000 in compensatory damages and $100,000 in punitive damages.

Gibbs charged UMW with having violated Taft-Hartley's Section 303 and also with having engaged in a "conspiracy" in violation of Tennessee common law (R. 10-14a, 20a, 23a, 30a). Gibbs alleged he had been employed by Grundy Mining Company to superintend coal mines to be opened in Marion County, Tennessee, and that he had been engaged by the same company as an independent contractor to haul coal by truck from such mines. He charged that UMW, upon learning the mines were to open, formed a picket line near the mine site, and by acts of violence,

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[3] The statutes involved are sometimes referred to herein as *Taft-Hartley* and *Norris-LaGuardia* and pertinent provisions thereof are set forth in Appendix A to this brief (p. 1, et seq.).

[4] Herein called "UMW" or "defendant".

prevented him and Grundy employees from going to work. Gibbs also alleged that UMW told others with whom Grundy and Gibbs were doing business they would suffer a similar fate if they did business with either of them (R. 13a) and that UMW induced "other employees of neutral employers as well as other persons not to do business with the plaintiff, Paul Gibbs" (R. 23-24a).

At a pre-trial conference (R. 20a) and by motion to dismiss, (R. 23a) UMW challenged the District Court's jurisdiction to determine the alleged common law claim. UMW's motion to dismiss, however, was overruled (R. 24-30a) on the theory that a violation of Section 303 could be "inferred" from the complaint and accordingly, under *Hurn* v. *Oursler*, 289 US 238 (1933) the Court would have ancillary or pendent jurisdiction of the common law allegations.

In its answer (R. 15a-17a) UMW again denied the District Court had jurisdiction over the subject matter of the controversy and denied also the complaint's material allegations.

The case was tried to a jury. At the close of the evidence UMW moved for a directed verdict on the ground that there was no evidence to sustain Gibbs' claim of UMW's inducement of certain neutral employers to cease doing business with Gibbs in violation of Section 303—to wit, employers George Ramsey, Tennessee Products and Chemical Corporation and Tennessee Consolidated Coal Company. The Motion was sustained (R. 66-71a). The case, however, was submitted to the jury with respect to Gibbs' contention that UMW wrongfully induced Grundy Mining Company to cease doing business with him and also with respect to the alleged cause of action under Tennessee common law (R. 66-67a, 71-72a). Special issues or interrogatories were submitted to the jury. By its verdict the jury found that UMW had violated both Section 303 and state law, damaging Gibbs as a supervisor for Grundy

Mining Company by $60,000, and as an independent trucker by $14,500. In addition the jury found Gibbs entitled to $100,000 in punitive damages (R. 31a-34a).

UMW filed a timely motion for judgment in accordance with its motion for a directed verdict or in the alternative for a new trial (R. 34-41a, 67-72a). Upon consideration of the motion the District Court held as follows (R. 42a-58a):

(1) It set aside the verdict awarding damages to Gibbs under Section 303 for loss of employment as a superintendent with the Grundy Mining Company. The District Court found there "clearly existed a primary dispute between UMW and Grundy" and, noting the statute expressly protects primary strikes and primary picketing, it held that "employees and supervisors of any struck or picketed primary employer who may lose their employment are not within the meaning of 'other persons' (as it appears in Section 303) and would have no statutory action for any loss so occasioned" (R. 53-54a).

(2) The District Court refused to set aside the verdict finding a Section 303 violation with respect to Gibbs' claim as an independent trucker for Grundy Mining Company. In reaching this conclusion the District Court noted that the jury found "an object of the picketing of Grundy was to cause it to cease employment of Gibbs", and held that Gibbs, as a trucker as distinguished from his other position of supervisor, was an independent contractor and therefore within the term "other persons" as found in Section 303 (R. 54a).

(3) The District Court nevertheless sustained UMW's motion for directed verdict with respect to Gibbs' claim as an independent trucker under both federal and state law because "The record is devoid of any evidence" of damages to Gibbs as an independent trucker. The District Court thus set aside the verdict in this regard which was in the amount of $14,500.

(4) It found the evidence sufficient to support the jury finding of common law conspiracy (R. 57a).

(5) It found that the closing argument of Gibbs' counsel was improper.[5] The District Court said the argument was "not so prejudicial as to warrant a new trial" but that it "should be taken into consideration by the Court upon the issue of excessiveness of the verdict" (R. 56a).

(6) The District Court found the award of compensatory damages for loss of employment as superintendent, which was in the amount of $60,000, was excessive to the extent of $30,000; and the verdict for punitive damages in the amount of $100,000 was excessive to the extent of $55,000. It suggested a remittitur in these amounts.

The suggested remittitur was accepted and judgment against UMW for $75,000 in accordance with the District Court's opinion was entered on August 26, 1963 (R. 59a-60a). Gibbs and UMW each filed a notice of appeal on September 25, 1963 (R. 62a-63a).

On appeal, the judgment was affirmed by the Sixth Circuit (R. 524-540a). To the extent material here the Sixth Circuit held as follows:[6]

(1) It found it unnecessary to determine whether a violation of Section 303 had been committed. The Court said, ". . . the federal questions presented by plaintiff's pleadings and proofs were not so 'plainly unsubstantial' as to destroy federal jurisdiction". And continuing, it held, under *Hurn* v. *Oursler*, 289 US 238 (1933), that federal jur-

[5] The argument is found at pages 481-493a of the Transcript of Record.

[6] Gibbs appeal was from the finding of the District Court that there was no evidence to support the jury's verdict for damages in the amount of $14,500 with respect to his claim as an independent trucker. The Sixth Circuit agreed with this conclusion of the District Court and affirmed the judgment in this respect.

isdiction having attached, the jury was permitted to consider whether a Tennessee common-law tort had been committed. On this point the Sixth Circuit concluded that the "jury's express determination that such a tort had indeed been committed is sufficient to sustain its award of damages, so we find no need to review its determination of the secondary boycott claims" (R. 532-533a). This conclusion is discussed under Question No. One.

(2) The Sixth Circuit found that federal preemption did not foreclose action under state common law. It found that "violence was a part of the common law tort involved" and that the case was comparable to *San Diego Building Trades Council* v. *Garmon*, 359 US 236 (1959), *United Automobile Workers* v. *Russell*, 356 US 634 (1958) and *United Construction Workers* v. *Laburnum*, 347 US 656 (1954) and distinguishable from *Teamsters Local 20* v. *Morton*, 377 US 252 (1964) (R. 534-535a). It found that although the proof was "sketchy" UMW was responsible for the illegal conduct. This conclusion is the subject of our Question No. Two.

(3) It held that the impropriety in the closing argument of Gibbs' Counsel fell "within a very narrow category calculated to influence the size of a favorable verdict without affecting the determination on the merits", and therefore that it was within the discretion of the District Court to employ a remittitur to avoid an excessive verdict. (R. 535-537). This conclusion is discussed in our Question No. Three.

(4) The Sixth Circuit did not expressly consider UMW's contention that the verdict for damages, which was based upon two theories, could not be sustained where it was subsequently determined that one of the theories was erroneous. The affirmance of the judgment thus was effective to deny this contention. This conclusion is the subject of Question No. Four herein.

B. STATEMENT OF THE EVIDENCE

1. Introduction

This case has its setting in Marion and Grundy Counties in Southern Tennessee. During the period material to this case the coal lands in this area were worked by two major companies, Tennessee Consolidated Coal Company ("Tennessee Consolidated") and Tennessee Products and Chemical Corporation ("Tennessee Products"), and a number of smaller coal operators (R. 89a-90a). Prior to the incidents here involved most of the mines, including those of the two major companies, operated under collective bargaining contracts with UMW (R. 95a-96a, 319a).

In the area UMW had chartered a number of local unions, including locals 5881 and 7083—whose membership was made up of employees of Tennessee Consolidated (Local 5881) and employees of operators operating the so-called "pocket" mines under lease or contract with Tennessee Consolidated (Local 7083).

For several years Tennessee Consolidated operated its major mine — the Coal Valley Mine — with TVA as its major customer. Effective December 31, 1959, however, TVA cancelled its coal purchase contract with Tennessee Consolidated.[7] About two weeks later Tennessee Consolidated gave UMW a sixty-day notice of cancellation of its collective bargaining agreement with UMW. Negotiations followed but failed to result in a new contract and the Coal Valley Mine closed March 15, 1963. This resulted in the unemployment of more than one hundred Coal Valley miners (R. 227a, 235a-237a, 296a-297a, 319a).

Perhaps a year before this a Tennessee Consolidated official, Paul Callis, had assembled the Coal Valley miners

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[7] Tennessee Consolidated had a subsidiary or affiliate corporation, Whitwell Coal Corporation, which conducted a strip mine in the area. The TVA contract being filled by Whitwell was not cancelled and Whitwell, under UMW contract, continued in operation throughout the period involved (R. 325a-327a).

and spoke of the possibility of the exhaustion of the Coal Valley mine and told the miners that the company's next mine operation would be in the nearby Gray's Creek area and that Coal Valley miners would be transferred to that operation (R. 304a, 393a-394a, 425a).

2. Paul Gibbs

Paul Gibbs was the operator of small hand loading coal mines under a sub-lease or contract with Tennessee Products and under a collective bargaining contract with UMW (R. 89a-91a, 94a, 135a). He trucked the coal to various points by his own trucks. His trucking operations were by and large confined to hauling coal he mined, but in 1960 he also trucked coal for another operator, Pikeville Coal Company (R. 89a-92a, 137a-139a). Before the incident involved in this case Gibbs had no business relationship with Tennessee Consolidated or Grundy Mining Company (R. 137a).

3. The Organization of Grundy Mining Company: The Decision to Open Gray's Creek Mines

After failing to negotiate a new agreement for the Coal Valley mine with UMW, Tennessee Consolidated formed the Grundy Mining Company, a wholly owned subsidiary of Tennessee Consolidated, to open a number of small mines in the "Gray's Creek" section of its property. Grundy's President was Judson Harwood, Tennessee Consolidated's lawyer. Grundy's other officers were the officers of Tennessee Consolidated (R. 193a-195a). Grundy Mining Co. was unknown to area miners, including Gibbs (R. 142a, 337a).

Ignoring the seniority built up by Tennessee Consolidated's Coal Valley mine's employees and its promise to those employees of the Gray's Creek work and without prior notice to UMW, Harwood phoned Gibbs on Friday, August 12, 1960, and offered him the job of opening some

mines at $600 per month. Gibbs told Harwood he would take the job if he could also have the contract to haul the coal from the mine. Harwood accepted, agreeing to pay 78¢ per ton for the hauling (R. 92a-94a).

Gibbs' conversation with Harwood was the only one he had with Tennessee Consolidated (or Grundy) officials prior to August 15 (R. 142a). From the conversation he knew that Coal Valley miners would *not* be employed or considered for the work. He did not know (even on the morning of August 15) who would man the job, except for two men he talked to, other than that Harwood had told him some forty men would be there (R. 99a-100a, 141a-143a). Grundy, with the assistance of the "Southern Labor Union", hired employees to work in the proposed mines on Saturday and Sunday before the scheduled Monday opening (R. 175a, 179a, 183a, 185-186a).[8]

On Saturday, August 13, rumor spread about the mining community that work was to commence at Gray's Creek. The news reached the unemployed Coal Valley miners (R. 393a, 416a, 320a, 457a). The president of their local union, UMW Local 5881, called a meeting for Sunday afternoon, which was attended by many of the members (R. 457a). Three members, after the meeting, decided to go to the proposed mine site the next morning. No representative of UMW or of District 19, United Mine Workers was present at the meeting. The District 19 representative in the area, George Gilbert, did not attend the meeting, and was not advised of it (R. 395a, 416-417a, 430-431a, 457a).

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[8] UMW charged Tennessee Consolidated with having unlawfully assisted Southern Labor Union in violation of Section 8(a) (2) of the National Labor Relations Act, 29 USC 158(a) (2), in this matter. The NLRB held that Tennessee Consolidated had so violated the Act, 131 NLRB 536, but the Sixth Circuit refused to enforce the Board's order. *NLRB* v. *Tennessee Consolidated Coal Co.*, (1962), 307 F. 2d. 374.

4. The Incidents of August 15 and 16 at Gray's Creek

Gibbs went alone to the proposed mine site on Monday, August 15. Soon thereafter three men arrived. These men were the Coal Valley miners who had decided at the local union meeting the day before to go to the mine site. They asked Gibbs if the mine was to open. He said he "heard" it was. There was no argument or disagreement of any kind. Gibbs left and spent the rest of the day at his nearby mines (R. 99-101a, 395-398a, 417-418a).

After Gibbs left, Johnny Cain, a Southern Labor Union organizer, and newly recruited employees, Dempsey Campbell and Willie Carl Fults, arrived at the proposed mine site (R. 177-178a, 185a). The Coal Valley miners told them that the Coal Valley men were to get the work (R. 398-399a). Cain claimed he was stopped from "going in" by "four to eight men", some of whom were armed (R. 151a). Other employees hired to start work for Grundy that morning lost their way and failed to reach the mine site (R. 101a, 180-181a).

The events of the following day, August 16, 1960, are the subject of considerable testimony. Gibbs said he arrived at the intersection of the Gray's Creek Road and "Pocket" Road (R. 75a) about 6:30 a.m. (R. 103a). Before his arrival, however, several of the men employed to work at the new mine had come to the intersection, where a large number of Coal Valley miners had gathered, and according to the testimony of the newly employed men, they were refused admittance and were rather unceremoniously chased away (R. 164-167a, 172-174a, 181-182a). Gibbs, arriving after the departure of the others, said he was threatened by the Coal Valley miners, including Walter Schrum, president of the local union (R. 103-109a, 140-141a). Gibbs went on to say that he, with Coal Valley miners to his front and rear, drove to a nearby road, where another group of miners was gathered about

John Cain, the Southern Labor Union organizer. According to Gibbs and Cain, Cain was struck by three of the men and the contents of Cain's briefcase were emptied and burned (R. 422a, 441a). Gibbs was not harmed. After a short time Cain, Gibbs and the others left; Gibbs went to his home (R. 458-459a, 422a, 441-444a, 108-109a, 152-154a).

5. The Evidence on the Issue of the Defendant's Responsibility for the Incidents of August 15 and 16

UMW is composed of intermediate subordinate branches, one of which, District 19, extends over part of Kentucky and Tennessee and is involved in this case. District 19 officials referred to in the record are James Ridings, President during the material period of this case, Albert Pass, Secretary-Treasurer, William Turnblazer, the present Acting President, and George Gilbert, District 19's field representative in the Southern Tennessee field in 1960. UMW stipulated that it was responsible for the actions of George Gilbert performed in the course and scope of his employment (R. 127a).

As stated above, the Sixth Circuit, although noting the proof was "sketchy as to defendant's responsibility", found UMW responsible for the violence of August 16. It held there was evidence from which the jury could have inferred that Gilbert had a part in the events of that day (R. 529-530a). This evidence was the trial testimony of Gibbs, who was asked whether he saw any officials of the International Union on August 15 or 16 in the Gray's Creek area. He replied (R. 126-127a): "Well, everything happened so fast there, I'm thinking that I seen Mr. Gilbert drive up there, but where he went I don't know." In response to a question as to what part Gilbert played in the activities, Gibbs said (R. 127a): "... he didn't play any part that I seen." This testimony is in conflict with Gibbs' pre-trial testimony, read in evidence by UMW (R. 479-480a). Gibbs' testimony, as we herein-

after discuss, was not relied upon by the District Court in this regard in its opinion nor was it relied upon by Gibbs in brief or argument in the Court of Appeals. Apart from the foregoing, the evidence is that Gilbert was not present on August 15 or 16 and that neither Gilbert nor any other District 19 representative authorized or suggested to members or officers of Local 5881 to forcibly prevent work or to picket at Gray's Creek on those days. No representative or officer of District 19 had knowledge of the existence of Grundy Mining Company or of the intention of Tennessee Consolidated (or Grundy) to open mines in the area at that time (R. 303-304a, 319a, 337a, 340-341a, 472-477a, 402a, 461-462a).

Gilbert accompanied by Bryan Parmlee, an officer of another UMW local in the area, had left Saturday, August 13, for District 19 headquarters at Middlesboro, Kentucky, where Gilbert was scheduled to attend a District Executive Board meeting. Parmlee was there to attend to routine matters for his local (R. 326-328a, 350-352a).

This uncontradicted evidence is verified by the testimony of Pass and Turnblazer (R. 297-298a, 471-472a).

The District's first information of the incident came Tuesday morning, the 16th, when a Local 5881 committeeman, telephoned Pass and told him that men were trying to take their jobs and that there was picketing at Gray's Creek. Pass, Ridings and Gilbert discussed the situation later that morning, and Gilbert was instructed to investigate and report back, to keep the pickets few in number and to make certain that the picketing did not result in a work stoppage at other mines located on Tennessee Consolidated's and Tennessee Products' property in the area. Gilbert and Parmlee left Middlesboro about 1:00 p.m. on the 16th and arrived at Gilbert's home in Jasper, Tennessee at 5:00 p.m. (R. 298-301a, 310-311a, 327-329a, 337a, 352-353a, 472-473a).

6. The Continuation of the Picketing at Gray's Creek

Following the incidents of August 15 and 16 members of Local 5881—all long-time employees of Tennessee Consolidated, Grundy's parent corporation—maintained pickets at the Gray's Creek mine until May, 1961 (R. 332-333a, 382-383a) when, as is hereinafter discussed, the Coal Valley mine was reopened and they or many of them were re-employed.

Gilbert, upon his return from Middlesboro, contacted leaders in Local 5881, and instructed them to maintain order and limit their pickets to three (R. 408-409a, 424-433a, 461-462a). Gilbert explained it took time to get this accomplished but that within days the pickets were so limited. He also instructed the pickets not to picket other mines operating in the area (R. 332-334a). Other area mines continued to operate, including Gibb's mine at Tennessee Products, even though the employees at those mines were union members and passed by the pickets on their way to work (R. 334-335a, 383-384a, 444-445a, 450-451a).

On August 22 or 23, William Turnblazer, of District 19, was sent to the area by District President Ridings. He testified (R. 473a):

> "... I explained to them that the labor board was there investigating and that certainly any mass picketing would only cause them a great deal of trouble, and instructed them that they should limit the number of their pickets and under no circumstances have any violence or any threats of violence to any person coming into or near that area."[9]

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[9] Charges were filed by Tennessee Consolidated and Grundy of violation of Section 8(b)(1)A of the National Labor Relations Act, 29 USC 158(b)(1)(A), with respect to the events of August 15 and 16. A complaint issued against Local 5881 (though not against UMW or District 19) and the Board found that the violation had occurred. See *Local Union 5881, UMWA and Grundy Mining Co.*, 130 NLRB 1181 (1961).

The attitude of District 19 is further indicated by Mr. Turnblazer in his answer to a question on cross-examination (R. 476a):

> "Q. Now, sir, what contractual right, if any, did your union have to forcefully stop this Mr. Paul Gibbs from going to work the morning of the 16th of August, 1960?
>
> "A. They had no right to forcibly, contractually or under the law, Mr. Van Derveer. Those employees had been promised that work by Mr. Gibbs' employer, Grundy, and Tennessee Consolidated, and that's why they were there. We tried to keep down the trouble, we did keep down the trouble, and the situation there remains that we think those employees are entitled to those rights, and we will assist them, but not through acts of violence or threats of violence."

Turnblazer testified that he knew of no disturbance that occurred on the picket line after that date or after August 16 (R. 473a). He said the union and he, personally, had done all within their power to maintain order on the picket line (R. 475-477a).

The record is barren of evidence of unlawful conduct or any evidence which indicates that after August 16 the picketing was other than orderly. During the following months there were but three pickets at a time at Gray's Creek (R. 384a, 405-406a, 424-425a, 433-434a, 444a). Grundy never sought to open the mines after August 16. There is no evidence in the record that Grundy or Gibbs was threatenend as to the opening of the mines after August 16.

There is evidence that Paul Callis, a Grundy official, was accosted and cursed at their commissary on August 17 by M. L. Guerry. Guerry, a sometime coal miner who had been employed as a night watchman at the commissary, was apparently drunk at the time and was angered by an investigation of missing property which he felt was a reflection on his character. He later apologized. No rep-

resentatives of the defendant union were present nor is there any evidence in the record that they were even advised of the incident. The incident was described as occurring in the midst of a great throng of armed coal miners. Gibbs was not present (R. 232-233a, 247-249a, 386a, 404-405a, 433a).

Beginning in November, 1960, District 19 provided weekly grocery orders in the amount of $25.00 to Coal Valley miners whose unemployment compensation was then exhausted and who were otherwise without income. Some of those present on August 16 received such grocery money as well as those who picketed Grundy thereafter, but picketing was not a requirement for the grocery orders (R. 134a, 300-303a).[10]

7. Objectives of the Picketing

The record establishes that the object of the pickets was to get for themselves the jobs they felt they deserved. Harvey Brown testified, "We was out there trying to protect our livelihood, as had been promised to the men, working there all their lives, working for Tennessee Consolidated Coal Company" (R. 435a). Robbie Vance described it this way: "Well, we had been promised that work by the Consolidated Coal Company, down in that section, and it was the only thing in the world that we had to live at. Since we had been there all our lives and everything, we felt like the work actually was ours, was Consolidated's property, and we was just asking for a living out of it, that's all." (R. 445a) Other testimony to the same

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[10] District 19 was not the only source of aid given to the Coal Valley miners. Gilbert testified, ". . . at first, there was quite a few operators, foremans that worked at the Coal Valley mine, merchants, the whole community was behind these boys. They thought they was within their rights for holding out for that job, and they give them food from all stores, grocery stores in that area, and they gave money—operators, politicians, everybody that passed was in sympathy with them and kept them going" (R. 336a).

effect was given by Walter Schrum (R. 460a, 461a), H. D. Ross (R. 387a), Clarence McGovern (394a, 402a) and William Turnblazer (R. 475-477a).

Gibbs testified that on August 18 he telephoned Gilbert. Gibbs said he had understood Gilbert was to have met him at the Monteagle Cemetery and didn't show up and that he called Gilbert to find out why. According to Gibbs, Gilbert said he was too busy, and that he wanted him to "keep his damn hands off that Gray's Creek area over there", and "to tell that Southern Labor Union that we don't intend for you to work that mine" (R. 127-129a).

Jim Campbell, a coal operator, testified he had gone to Gilbert's house on the afternoon of August 17, 1960. According to Campbell, Gilbert said Gibbs was trying to bring in the Southern Labor Union and the union wouldn't let him do it. Gilbert further said, according to Campbell, that Gibbs was going to have to go and that he, Gilbert, had friends in high places that could move him out (R. 257-258a).

John Higgins testified he talked to Gilbert about the time the "new union" was going in, or while the picket line was on, and that Gilbert had said, ". . . we can't let that go on . . . it would all be like that," and also that "Paul was trying this other union in there and . . . he ain't going to get by with it" (R. 218-219a).[11]

Samuel Swope, a salesman, testified that he was in the area on August 22, 1960. He said he saw a group of men around a tent about 50 yards off Highway 108 and a rifle laying against a log. He also testified that he saw Gilbert nearby and asked Gilbert if he could get to the strip operations of the Whitwell Coal Company and Gilbert said he could "go down through the pocket and turn to the right at a coal tipple and there would be

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[11] Gilbert's testimony concerning statements of Gibbs, Campbell and Higgins is found in the Transcript of Record at pages 328-332a and 337-339a.

some of his men there for us to tell them that he said it was all right to go through'' (R. 160-161a).

The fact that Gibbs owned and operated trucks and had an agreement to truck coal from Grundy when it got into production played no part in the dispute (R. 122-123a). UMW did not know Gibbs had a trucking contract with Grundy, nor did UMW have any dispute with Gibbs either as an operator or as a trucking contractor. He was under contract with UMW and there was no dispute at his mines or with his truck drivers.

In the spring of 1961, after the Coal Valley miners had been picketing at the entrance to the proposed Gray's Creek mines for eight months, Tennessee Consolidated engaged Allen and Garcia, an engineering firm, to reopen and operate the Coal Valley Mine. Allen and Garcia entered into a contract with UMW and the Coal Valley miners were reemployed. The picketing at Gray's Creek ceased, but neither Tennessee Consolidated nor its subsidiary, Grundy, pursued development of mines in the Gray's Creek area (R. 237-9a, 305-7a, 473-4a).

8. The Opening of Mines in Gray's Creek

In June, 1962, the reopened Coal Valley mine ran into a fault and a part of the mine caved in. Operations there were abandoned and at that time (well after the institution of the instant case) a mechanized mine was opened in Gray's Creek. The equipment at the Coal Valley mine was moved to the new mine and the Coal Valley miners were transferred to this operation. This work was done be Allen and Garcia under its contract with Tennessee Consolidated. Allen and Garcia withdrew from its agreement with Tennessee Consolidated in late summer, 1962, and gave UMW a sixty-day notice of contract cancellation, which contract thus ended October 24, 1962, a few days before trial in the Gibbs case. UMW was notified that the operation would be continued by Grundy, and Grundy and District 19 officials agreed that the collective bargaining agreement would be considered in effect until

the October 24 termination date. Thereafter UMW and Grundy undertook to negotiate a new contract. These negotiations were underway at the time of trial. In the meantime Grundy opened some seven or eight small non-mechanized mines in Gray's Creek (R. 206-14a, 237-243a, 305a, 388-91a, 473-77a).

SUMMARY OF ARGUMENT

I.

In this, an action for damages growing out of a labor dispute between a union and an employer engaged in commerce, jurisdiction was founded on and damages were sought under Section 303 of the Labor Management Relations Act.[12] Damages were also sought on the basis of an alleged state common law cause of action conjoined with the asserted federal cause of action.

The Sixth Circuit found it unnecessary to determine whether the claim under Section 303 had merit either in fact or law. That Court found the assertion of the federal claim was sufficient to vest the District Court with jurisdiction of the non-federal claim.

The Sixth Circuit's approval of federal jurisdiction over the non-federal claim asserted herein improperly implemented the doctrine of pendent jurisdiction as enunciated in *Hurn* v. *Oursler*, 289 US 238 (1933).

Pendent jurisdiction should not have been exercised because the federal and state claims are not merely distinct grounds of a single cause of action; they are separate and distinct causes of action. A cause of action relates to the violation of a *right*, *Baltimore S.S. Co.* v. *Phillips*, 274 US 316 (1927) and, plainly, the right pro-

[12] Jurisdiction was also alleged in the complaint on the theory of diversity of citizenship. The District Court rejected the diversity theory on UMW's motion to dismiss, and this ground of jurisdiction was not thereafter pressed (R. 25a). The disposition of this question accords with this Court's decision in *United Steelworkers of America* v. *R. H. Bouligny, Inc.*, —— U.S. ——, 34 LW 4019 (1965).

tected by Section 303 and the right protected from common law conspiracy and interference are different in concept and scope. Section 303 was narrowly conceived, as shown by legislative history and the statute itself, and makes actionable secondary activity against "other" persons with whom an employer-disputant is doing business. Section 303 does not give assurance that an employer will be free of union activity "by means other than those proscribed". *Local 1976, United Bro. of Carpenters* v. *NLRB,* 357 US 93, 99 (1958). Common law interference, on the other hand, condemns *all* invasions of contractual relationships by unlawful means.

The federal and state claims are also to be considered separate and distinct causes of action because there are substantial and material differences in the facts relating to the respective claims. A partial coincidence of facts does not establish a single cause of action, hence pendent jurisdiction may not be exercised. In these circumstances, absent diversity of citizenship, federal courts are without authority to enforce state laws, and conduct "however reprehensible, does not give the federal courts jurisdiction". *Apex Hosiery Co.* v. *Leader,* 310 US 469 (1946), *Hunt* v. *Crumboch,* 325 US 821 (1945).

Moreover it was error to invoke pendent jurisdiction of the non-federal claim because the federal claim asserted was wholly unsubstantial. *Bell* v. *Hood,* 327 US 678 (1946). Picketing at the job site for the purpose of protecting job rights and to obtain a collective bargaining agreement is not proscribed by Seciton 303 and contrary arguments have been foreclosed by decisions of this Court, *Local 761, IUE* v. *NLRB,* 366 US 667 (1961); *United Steelworkers* v. *NLRB,* 376 US 492 (1964). The pickets were without knowledge of Gibbs' engagement as an independent contractor hence it was impossible for them to have had the intent or specific objective required in a Section 303 action. *Local 1976, United Brotherhood of Carpenters* v. *NLRB,* 357 US 93, 98 (1958).

II.

The judgment based on state law is contrary to the principle of federal preemption.

In the instant case members of UMW, unemployed because of the failure of their employer and UMW to agree upon a collective bargaining agreement, commenced picketing, without UMW's knowledge or authorization, when their employer sought in effect, to replace them with employees recruited by a rival union. The picketing was marked by violence in its initial stages.

It was error, nonetheless, to impose judgment against UMW under state law for, contrary to the Sixth Circuit's findings, there is neither clear proof of UMW's participation in or ratification of the violence, as required by Section 6 of the Norris-LaGuardia Act, *United Brotherhood of Carpenters and Joiners* v. *U. S.*, 330 US 395, nor substantial evidence of UMW's responsibility under any standard of evidence.

The occurrence of violence does not permit application of state law to non-violence aspects of a labor dispute. *Youngdahl* v. *Rainfair, Inc.*, 355 US 131 (1957).

UMW's role in the dispute was to maintain order at the picket line and to assist its members in securing claimed job rights and a collective bargaining agreement. UMW had lawful and proper reasons to involve itself in the picketing and an intention to ratify the prior violence may not be inferred from acts which may be readily explained without involving any intention to ratify. The elements of ratification are lacking. 3 Am. Jur. 2d, Agency, Section 170. Because UMW did not participate or ratify the violence and because its conduct was within the regulatory scope of the Labor-Management Relations Act, a judgment for damages under state law may not stand. *San Diego Building Trades Council* v. *Garmon*, 359 US 236 (1959), *Teamsters Local 20* v. *Morton*, 377 US 252 (1964).

The judgment is an implicit use of the "totality of effort rule", in that acts beyond the power of a state to regulate were shown in evidence as a part of the common law cause of action. The judgment must therefore be reversed even if it appears that UMW was responsible for the violence for "the District Court was without power to award damages proximately caused by lawful primary activity, even though (a union) may have contemporarily engaged in unlawful acts elsewhere." *Teamsters Local 20 v. Morton*, 377 US 252 (1964). In fact, UMW asserts that federally proscribed violent secondary picketing preempts state law in this field because Congress provided damages for a Section 303 violation which is the missing ingredient this Court relied upon in *UAW* v. *Russell*, 356 US 634, and *UCW* v. *Laburnum Construction Corp.*, 347 US 656, to sustain state law.

III.

UMW is entitled to a new trial because of the nature of the closing argument to the jury of Gibbs' counsel. The argument was an indiscriminate appeal to prejudice particularly on matters not in evidence. The District Court properly held that counsel may not share "his client's prejudices" with the jury, (220 F. Supp. 871, 880) but erred in undertaking to cure the effect of the appeal by a remittitur. A litigant is entitled to a fair trial on all issues and such an appeal is as "effective to beget a wholly wrong verdict as to produce an excessive one." *Minneapolis, St. Paul & S.S.M. Railway* v. *Moquin*, 283 US 520, 521 (1931).

Moreover, it was error to find, as did the Sixth Circuit, that the offending remarks fell within "the very narrow category calculated to influence the size of a favorable verdict without affecting the determinations on the merits" (R. 536). The distinction made conflicts with the intended and manifest nature of the argument, which was addressed as much to the issue of liability as it was to the issue of damages. The distinction neither served the justice of the

case nor the requirements of the administration of justice as reflected in trial practice.

IV.

The verdict for damages, which was based upon two theories, may not be sustained where, as here, it was determined that one theory was erroneous and where it is impossible to determine which theory or to what extent each theory prompted the verdict on the damage issue. A new trial should be granted. *Sunkist Growers, Inc.* v. *Winckler and Smith Citrus Products Co.*, 370 US 19 (1962).

ARGUMENT

Question No. One

The Courts Below Improperly Invoked the Doctrine of Pendent Jurisdiction In Adjudicating the Common Law Cause of Action

Finding that the cause of action asserted under Section 303 and the asserted cause of action under Tennessee common law "were merelydifferent grounds to support a single cause of action" (R. 533a), the Sixth Circuit sanctioned the exercise of pendent jurisdiction in the instant case and affirmed a judgment for damages based on state law.

The decision under review is one of a number of cases involving Petitioner in which the Sixth Circuit has approved the exercise of pendent jurisdiction.[18]

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[18] UMW v. Meadow Creek Coal Co., 263 F. 2d 52 (CA 6, 1959), cert. denied, 359 U.S. 1013 (1959); UMW v. Osborne Mining Co., 279 F. 2d 716 (CA 6, 1960), cert. denied, 364 U.S. 881 (1960); Gilchrist v. UMW, 290 F. 2d 36 (CA 6, 1961), cert. denied, 368 U.S. 875 (1961); Flame Coal Co. v. UMW, 303 F. 2d 39 (CA 6, 1962), cert. denied, 371 U.S. 891 (1962); Sunfire Coal Co. v. UMW, 313 F. 2d 108 (CA 6, 1963), cert. denied, 375 U.S. 924 (1963); White Oak Coal Co. v. UMW, 318 F. 2d 591 (CA 6, 1963), cert. denied, 375 U.S. 966 (1964); Allen v. UMW, 319 F. 2d 594 (CA 6, 1963); Price v. UMW, 336 F. 2d 771 (CA 6, 1964), cert. denied, 85 S. Ct. 899, —— U.S. —— (1965).

These decisions have been based on *Hurn* v. *Oursler*, 289 US 238 (1933), generally recognized as a landmark case on the judicially created pendent jurisdiction doctrine. This Court there (p. 246) distinguished between "a case where two distinct grounds in support of a single cause of action are alleged, only one of which presents a federal question, and a case where two separate and distinct causes of action are alleged, one only of which is federal in character". It went on to hold that where the federal question "is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the nonfederal *ground;* in the latter it may not do so upon the nonfederal *cause of action.*" (Emphasis the court's)

Hurn involved a federal claim for copyright infringement. The court found the asserted federal claim warranted a decision on the merits of a state law claim of unfair competition which was also alleged as a basis for recovery. Whether the use of the *Hurn* jurisdictional concept was originally intended to apply in other types of litigation, such an extension has developed.[14]

The determination of state law issues is, of course, often a matter of necessity in litigation in federal courts. *J. I. Case Co.* v. *Borak*, 377 US 426 (1964). As it has been construed the significance of *Hurn* is that jurisdiction of a federal court is not limited to a determination of only those state issues which are essential or necessary to a decision. In an appropriate case a federal court may decide a state law issue which is procedurally convenient for it to decide. This, of course, is the justification for the extension of the pendent jurisdiction doctrine. Difficulties have occurred, however, in determining which cases are appropriate, under *Hurn*, for the exercise of pendent jurisdiction. The requirements of *Hurn* are stated in terms

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[14] See, *"The Evolution and Scope of the Doctrine of Pendent Jurisdiction in the Federal Courts,"* 62 Col. L. Rev. 1018, 1021.

of a substantial federal question and a single cause of action. The illusive concept of what is a substantial federal cause of action, as distinguished from a cause of action which is not merely unfounded but also lacking in substance or color, and of what constitutes a separate cause of action as distinguished from a separate ground of a single cause of action, have resulted in decisions which are impossible to reconcile. According to one commentator, application of the *Hurn* standards

> "have been a source of constant difficulty and has led to close distinctions that hardly seem to have any bearing either on the general values that should govern in the administration of justice or the special value of avoiding federal intrusion in state spheres." [15]

Recently this Court, reviewing a case from the Sixth Circuit, in which common law claims were coupled to an action under Section 303, and in which a judgment for damages was affirmed under both federal and state law, stated that, "Pendent jurisdiction permits a federal court *under some circumstances* to determine a state cause of action which otherwise would have to be heard in the state court". (Emphasis ours) *Teamsters Local 20* v. *Morton*, 377 US 252, 257 (1964). It was quite evident, however, that the union conduct before this Court in *Morton* could not be proscribed by state law because of the doctrine of federal preemption, hence it was unnecessary for this court to determine to what extent, if any, the pendent jurisdiction doctrine would have authorized consideration of a non-preempted cause of action.

There are certain similarities in the *Morton* case and the instant case as well as the other UMW pendent jurisdiction cases cited and relied upon by the Sixth Circuit in holding in *Morton* that it had pendent jurisdiction. Even though the instant case contains evidence of vio-

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[15] See Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 Law & Contemporary Problems, 216, 232 (1948).

lence which was lacking in *Morton*, we believe, for the reasons discussed in Question Two, preemption affords UMW a defense because the state cause of action included nonviolent permissible activity and violent secondary activity. The preemption question aside, however, we believe there was error in the exercise of pendent jurisdiction, for reasons we now discuss.

A threshold question lies in the identification of Gibbs' federal cause of action as distinguished from his state cause of action. We are told that a "cause of action does not consist of facts, but of the unlawful violation of a right which the facts show." *Baltimore S.S. Co.* v. *Phillips*, 274 US 316 (1927). And in applying the standards which it announced, this Court in *Hurn* said the federal and state claims there involved "so precisely rest upon identical facts as to be little more than the equivalent of different epithets to characterize the same group of circumstances." 289 US 238, 246.[16]

It is apparent that the right protected by a state cause of action of interference or conspiracy is far more inclusive than is the right protected by the federal cause of action under Section 303. Section 303, to be sure, prohibits a *form* of interference in a labor dispute. Repeated decisions of this court have held, however, that the "interference" proscribed by Section 303 or its counterpart, Section 8(b)(4), 29 USC 158(b)(4)[17] is that which is addressed to a secondary or neutral employer and not to the employer primarily involved in the labor dispute. *Local 1976, United Bro. of Carpenters* v. *NLRB*, 357 US 93, *United Steelworkers of America* v. *NLRB*, 376 US 492 (1964), *Local 761, Int'l Union of Electrical Workers* v. *NLRB*, 366 US

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[16] The cases of *Bell* v. *Hood*, 327 U.S. 678 (1946) and *Strachman* v. *Palmer*, 177 F. 2d 427 (1949), in which pendent jurisdiction was found, involved federal and non-federal claims of this type.

[17] Material provisions of Section 303 and Section 8(b)(4) are found in Appendix A to this brief.

667 (1961), *NLRB* v. *International Rice Milling Co.*, 341 US 665 (1951), *Teamsters Local 20* v. *Morton*, 377 US 252 (1964). In other words, the right protected under federal law is the right to be free from pressure addressed to third persons in a position to harm another by withholding a contractual advantage from him and the right of the third person not to be drawn into the dispute of another. Nor was the limited scope of Section 303 mere coincidence. Its enactment followed the rejection by the House and Senate Committee which reported out the Taft-Hartley Act, of a measure which would have vested jurisdiction in the federal courts to determine actions for damages based on practically every variety of interference which might occur during the course of a labor dispute.[18]

The limitations of Section 303 are to be contrasted with the breadth of Gibbs' state law claim. As the District Court charged the jury (R. 505a), "Under the common law a wrongful interference includes all invasions of contractual relationship by unlawful means, including an act injuring or destroying persons or property which retard or make more difficult or prevent performance or make performance of the contractual relationship less valuable to the parties thereto." The District Court also charged relative to the state causes of action, that a "conspiracy may be defined as an agreement between two or more organizations or associations . . . to do an unlawful thing, or to do a lawful thing by lawful means" (R. 507a).

The fundamental distinctions in the concept and purpose of the cause of action defined by Section 303 and that defined as common law interference and conspiracy, are apparent from these definitions.

As this court stated in *Local 1976, United Brotherhood of Carpenters* v. *NLRB*, 357 US 93, 99 (1958) an employer

[18] See House Bill 3020 (Legislative History of the Labor Management Relations Act, 1947, Vol. 1, pp. 158, 204). We have copied Section 12 of H.R. 3020 in Appendix B to this brief.

"has no absolute assurance (under federal law) that he will be free from the consequences" of union activity "by means other than those proscribed" in Section 303. It may be argued that an employer or an individual, such as Gibbs, has the right to be free from forms of interference other than those proscribed by Section 303, but that right derives from a different authority and it is different in concept and purpose, as we have shown, from the right created by Congress.

The distinction which is apparent in the definition of the right to be free of activity proscribed by Section 303 and the right to be free of, and that condemned as, common law interference, is equally apparent from the allegations of the complaint and the evidence. The federal and state claims here involved are not, in a factual sense, "different epithets to characterize the same group of facts". For example, in paragraph VI of the complaint, it is *expressly stated* that the picketing was commenced for the purpose of preventing men from taking jobs which the pickets claim as their own, and that this picketing occurred before "Gibbs arrived on the scene" (R. 12-13a). This picketing was alleged and was later shown in evidence as a part of Gibbs' cause of action and necessarily, we think, as a part of his state cause of action. Certainly picketing for the purpose of protecting claimed job rights, carried on at the situs of the work, is not secondary under the language of the statute or the decisions of this Court cited above.

Much of the evidence considered by the jury in deciding Gibbs' common law cause of action was equally without relevance to union activity prohibited by Section 303. The fact that picketing continued at the mine long after Gibbs ceased to be involved; the fact that UMW was seeking to obtain a new contract with Grundy or its parent corporation, Tennessee Consolidated Coal Company; the fact that UMW gave financial assistance to the men, again after Gibbs ceased to be involved; the fact that UMW obtained

a contract under which its members were re-employed; and the fact that Gibbs, after the cessation of picketing, was not given a lease by Tennessee Consolidated, were all vital parts of his common law cause of action.[19] The distinction between the rights protected by Section 303 and state law is best pointed up by Gibbs' counsel in his closing argument. Counsel argued UMW conspired to obtain a particular contract and this harmed Gibbs, Counsel stated (R. 484a):

> ". . . and here is the conspiracy. Mr. Pass testified, we want that contract all over this nation. That contract or better. I don't guess at that, there is his testimony. There is no deviation from that contract. Mr. Turnblazer so says, unless it is approved in Washington. They impose a nationwide contract all over this nation, all over. I don't care whether it is in Canada or West Virginia or California or Tennessee."

Obviously, as we think, none of these activities related to conduct proscribed by Section 303. And if Gibbs had rights which were violated by this conduct, they were rights derived from a non-federal source.

It is true that factual elements of the case relating primarily to the picketing and violence of August 16 were claimed as a basis by Gibbs for both his alleged federal and non-federal cause of action. But a partial coincidence of facts falls short of establishing a single cause of action. Indeed, though it is apparent from the *Hurn* decision that one of the claims advanced by the plaintiff in that case would have involved some facts common to other claims made in that case, it was dismissed on jurisdictional grounds.[20]

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[19] The facts here referred to are detailed at pages 14-18 in this brief.

[20] The *Hurn* case had three counts, one for the infringement of copyrighted play under federal law, a second based on a claim of unfair competition of the play, and a third based on a claim of unfair competition of an uncopyrighted version of the play.

(*Continued on next page.*)

In a comparable situation this Court has rejected the contention that federal courts had jurisdiction to determine a cause of action under state law. *Apex Hosiery Co.* v. *Leader*, 310 US 469 (1946), was an action under the Sherman Act which involved a strike marked by extreme public disorder. At least some of the facts before the Court in that case would have been relevant to a cause of action under state law. The Court said (p. 483-484):

> "It is not denied, and we assume for present purposes, that respondents . . . violated the civil and penal laws of Pennsylvania which authorize the recovery of full compensation and impose criminal penalties for the wrongs done. *But in this suit, in which no diversity of citizenship of the parties is alleged or shown, the federal courts are without authority to enforce state laws. Their only jurisdiction is to vindicate such federal right as Congress has conferred on petitioner by the Sherman Act and violence, as will appear hereafter, however reprehensible, does not give the federal courts jurisdiction.*"
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> "The maintenance in our federal system of a proper distribution between state and national governments of police authority and of remedies private and public for public wrongs is of far-reaching importance. An intention to disturb the balance is not lightly to be imputed to Congress . . . ." (p. 513) (Emphasis ours).

So, too, in *Hunt* v. *Crumboch*, 325 US 821 (1945), an action against a labor organization wherein plaintiff relied upon acts alleged to be violative of the Sherman Act identical to those which would have been considered under Pennsylvania's common law, this Court stated that (p. 826) "whether the respondents' conduct amounts to an action-

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(*Footnote Cont'd*)

Pendent jurisdiction was found to exist with regard to the second but not the third count. The "wrongful acts" complained of were apparently common to each count. The distinction was based on the fact that the third count "did not rest upon any federal ground and was wholly independent of the claim of copyright infringement." 289 U.S. 238, 248.

able wrong subjecting them to liability for damages under Pennsylvania law is not our concern."

See also: *United Mine Workers of America* v. *Patton*, 211 F 2d 742, 749; *Seeley* v. *Brotherhood of Painters*, 308 F 2d 52 (CA 5, 1962); *Crabb* v. *Weldon Bros.*, 164 F 2d 797 (CA 8, 1947); *French Renovating Co.* v. *Ray Renovating Co.*, 170 F 2d 945 (CA 6, 1948); *Pearce* v. *Pennsylvania R.R. Co.*, 162 F 2d 524 (CA 3, 1947); *Musher Foundation* v. *Alba Trading Co.*, 127 F 2d 9 (CA 2, 1942).

It is therefore manifest that pendent jurisdiction was erroneously found in the instant case. The federal and state claims here involved are not merely different grounds of a single cause of action. The rights asserted in the federal and non-federal claims are different in scope and concept and there are subtsantial and material differences in the facts relative to the respective claims.

There is an additional reason why pendent jurisdiction should be denied. As stated in *Hurn* and later by this Court in *Bell* v. *Hood*, 327 US 678 (1946), to invest a federal court with pendent jurisdiction of a state claim the federal claim asserted must not be wholly unsubstantial. UMW contends that the claim asserted under Section 303 by Gibbs was wholly unsubstantial.

As we have stated, this case involves primary activity of a singular form. The protest obviously concerned Grundy's efforts to replace UMW members who had worked for years for Grundy's parent corporation. The picketing and violence occurred at the situs of the dispute. Gibbs' work as a supervisor was to take place at the job site which was picketed and his work as a trucking contractor was to involve the transportation of coal from the mine—a normal part of Grundy's work. In light of these considerations, apparent in the pleadings and proof, the Section 303 claim is without substance. Every conceivable argument to the contrary has been foreclosed by *Local 761, IUE*

v. *NLRB*, 366 US 667 (1961), *NLRB* v. *International Rice Milling Co.*, 341 US 665 (1951), and *United Steelworkers* v. *NLRB*, 376 US 492 (1964).

Furthermore, it was error to find substance in the federal claim on the theory that Gibbs had status as an independent contractor as well as an employee. The picket line misconduct complained of occurred before Gibbs was to undertake performance of his trucking contract and hence none of his trucking employees were involved in the dispute. There was no dispute between UMW and Gibbs as a trucking contractor. Thus, there could have been no secondary dispute with Grundy. The fact that Gibbs as an independent contractor had the capacity to be "any other person" within the meaning of the Act was irrelevant or meaningless to the issues. It is idle to say that a substantial federal question under Section 303 is posed under such circumstances. Moreover, none of the pickets were aware of Gibbs' trucking contract. Because they were without knowledge, it was impossible for the pickets to have had the intent or specific objective required in a Section 303 violation. *Local 1976, United Brotherhood of Carpenters* v. *NLRB*, 357 US 93, 98 (1958).

We, therefore, submit that the Sixth Circuit erred in its exercise of pendent jurisdiction.

Question No. Two

The Judgment for Damages Under State Law Is Based on UMW Participation in or Ratification of Picket Line Violence and Is Contrary to the "Clear Proof" Requirements of the Norris-LaGuardia Act and the Doctrine of Federal Preemption.

In the instant case there is evidence of violence on the first two days of the dispute, August 15 and 16, 1960. The Coal Valley miners, members of UMW Local Union 5881, gathered at the mine entrance and forcibly prevented Gibbs and some eighteen newly hired men from going into the mine area. We acknowledge that this evidence is the equiv-

alent of the evidence of misconduct which this Court considered in *United Automobile Workers* v. *Russell*, 356 US 634 (1958) and found sufficient as the basis for an award of damages under Alabama law.

This action, however, is against UMW, not Local 5881 or its individual members. Assuming the existence of pendent jurisdiction UMW contends it was error to award damages against it under state law, for (1) there was no evidence under the applicable standard of proof of UMW's participation in the violence of August 15 and 16; (2) UMW's subsequent involvement in the dispute is not clear proof of ratification of prior violence; and (3) the imposition of liability under state law to UMW's activities in the dispute conflicts with the doctrine of federal preemption.

Initially we observe that the District Court did not expressly determine the issue of UMW's participation in the violence. The District Court said (R. 46a):

> "*Without now determining whether the evidence was sufficient to permit a jury finding that UMW was responsible for the activities and violence testified to as having occurred in the Gray's Creek Area upon August 15 and 16, 1960,* it appears undisputed that the UMW became aware of such activities by the 16th. There is evidence upon which the jury could find that thereafter Gilbert participated in and supported, if not controlled, the picketing that occurred." (Emphasis ours)

Though the issue of participation was crucial, the District Court never returned to it in its lengthy opinion, except to note that the jury found that "defendant conspired to wrongfully interfere" and to hold that "there is evidence in the record, when the testimony is viewed as a whole, to support the verdict of the jury in this respect" and to state, without pointing out a basis for finding UMW responsible therefor, that "there was evidence of violence . . . which was such unlawful conduct as to support a verdict based upon common law conspiracy" (R. 55a).

The Sixth Circuit's conclusions are more explicit. Finding "circumstantial evidence from which the jury could find that District 19's representative Gilbert had a part in arranging the events of August 15 and 16", and expressing its "impression that the threat of violence remained" throughout the course of the picketing after August 15 and 16, the Sixth Circuit said (R. 535):

> "Whether it be inferred that defendant UMW through its agents had a hand in planning and carrying out the original violence, whether they ratified the violent conduct by using it to make effective the subsequent so-called peaceful picketing, or whether the violent character continued as a threat throughout the entire picketing, we believe that violence was part of the common-law tort involved, and action therefor was saved from preemption . . . "

The error in this conclusion we believe is manifest for the following reasons:

1. Absent participation in or ratification of the violent conduct by its agents it is clear that liability may not be imposed on a labor organization by reason thereof. Membership in a labor organization does not establish the members as an agent of the organization. *United States* v. *White*, 322 US 694 (1944). Nor does advocacy of the union by rank and file employees constitute them agents of the union. *Poinsett Lumber and Mfg. Co.*, 107 NLRB 234 (1953). See also *Sunset Line and Twine Co.*, 79 NLRB 1487, 1507, 1514. In a material context it has been held that "imputation of the acts of one person to another" is forbidden "except when the one is acting as agent for the other". *International Ladies Garment Workers Union* v. *NLRB*, 237 F 2d 545, 551 (CADC, 1956). Accord: *NLRB* v. *Ohio Calcium Company*, 133 F 2d 721 (CA 6, 1943), *NLRB* v. *Marshall Car Wheel, etc.*, 218 F 2d 409, 417 (CA 5, 1955).

The requirement of agency was recognized by the Sixth Circuit, for as we understand its opinion, liability was not

based upon the actions of employee-members, but rather upon its finding of participation in or ratification of violence by a representative of UMW.

2. The finding of participation or ratification is contrary, we believe, to *any* standard of evidence or rule of agency. The finding is more clearly erroneous when it is considered that the standard by which liability is to be determined with respect to the state law claim in this case is that of Section 6 of the Norris-LaGuardia Act, 47 Stat. 71, 29 USC 106.

Section 6 of that Act contains Congress' directive that no labor organization shall be responsible or liable "*in any court of the United States* for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."[21]

While less exacting standards of evidence concerning agency are applicable in administrative proceedings and suits under the Taft-Hartley Act [29 USC 152 (13) and 185 (e)], this Court noted that this was because in the Act's Section 301(e) Congress had declared that "For the purposes of this section, in determining whether any person is acting as an 'agent' . . . so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling" and that "This, of course, was designed to and did repeal" Norris-

[21] Section 6 reads thus:

"No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."

LaGuardia's Section 6 as to suits brought under Section 301 (29 USC 185). *Sinclair Refining Co.* v. *Atkinson*, 370 US 195, 204 fn. 17 (1962).[22] See also the Act's Section 2(13) [29 USC 152(13)]. However, since the Sixth Circuit's approval of the judgment below deals with the common-law claim under Tennessee law, it must be noted that the purpose of the Norris-LaGuardia Act was to limit "the jurisdiction and authority of courts of the United States in labor disputes". This Court has declared that Section 6's limitations "are upon all courts of the United States". *United Brotherhood of Carpenters and Joiners* v. *U. S.*, 330 US 395, 401.[23]

Consistent with Norris-LaGuardia's purpose, Section 6 manifests an intention that unions participating or interested in a labor dispute may be held liable for tortious conduct only upon a higher degree of proof than is normally required in civil cases. The use of the term "clear proof" is alone sufficient to place this type of action in a category of cases requiring evidence of a high degree of certainty. 20 Am. Jur., Evidence, Sections 1252 and 1253. Moreover, the repetitive use of the word "actual" in the enactment, as in the terms "actual participation" or "actual authorization" or ratification after "actual knowledge", evidences the demanding nature of the standard.

This Court confirmed this interpretation in the *Carpenters* case (330 US 395). Therein considering the meaning of the word "authorization", as it appears in Section 6, it said (p. 406-7):

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[22] See Section 2 of the Norris-LaGuardia Act (29 USC 102) which is set forth in Appendix C.

[23] See *A. H. Bull Steamship Company* v. *Seafarer's International Union*, 250 F. 2d 326 (CA 2, 1957), wherein the Second Circuit stated that as to Norris-LaGuardia's Section 4 (29 USC 104, which appears in Appendix C), Taft-Hartley's Section 301 did not expressly or impliedly "withdraw the restrictions of the Norris-LaGuardia Act".

" . . . We are of the opinion that the requirement of 'authorization' restricts the responsibility or liability in labor disputes of employer or employee associations, organizations or their members for unlawful acts of the officers or members of those associations or organizations, *although such officers or members are acting within the scope of their general authority as such officers or members, to those associations, organizations or their officers or members who actually participate in the unlawful acts, except upon clear proof that the particular act charged, or acts generally of that type and quality had been expressly authorized, or necessarily followed from a granted authority, by the association or nonparticipating member sought to be charged or was subsequently ratified by such association, organization or member after actual knowledge of its occurrence.*" (Emphasis ours)

The imputation of liability under state law in the instant case is to be tested by this standard.

3. The record in this case is positive that no UMW representative participated in or authorized the conduct of the pickets on August 15 and 16. The hasty and quiet efforts of Grundy Mining Company to open mines in the Grays Creek area with employees to be "organized" by Southern Labor Union were not known to UMW's District 19 officials and representatives, including Gilbert, until after the material events of those days had transpired. This evidence is set forth in Section B of our Statement of Evidence (pp. 9-11 herein).

It is for these reasons we contend that under no standard of evidence may liability be imposed on the theory that UMW participated in this misconduct.

The Sixth Circuit disagreed with this contention. It found a basis for an inference of participation from statements attributed to District Representative Gilbert, all made well *after* the fact. to the effect that Gibbs "was trying to get this other union in there and . . . he ain't going

to get by with it" (R. 218-219a; see also R. 257-258a, R. 127-129a). The Sixth Circuit also pointed to testimony of Gibbs with regard to the identification of union men who were present at Grays Creek on August 15 or 16. Gibbs testified (R. 126a): "Well, everything happened so fast there, I'm thinking that I seen Mr. Gilbert drive up there, but where he went I don't know." Gibbs also said: "he (Gilbert) didn't play any part that I seen."

This testimony is insufficient in law to warrant a verdict based on Gilbert's presence, even disregarding positive contrary evidence and Gibbs' markedly inconsistent pretrial deposition (R. 479a). Evidence must in itself have fitness to induce conviction, even if uncontradicted. *Standard Oil Co.* v. *Roach*, 21 Tenn. App. 661, 666. Thus, in *May* v. *Railroad*, 129 Tenn. 521, where a witness testified that an incident occurred September 12, according to her best recollection, but she could not be certain, the Tennessee Supreme Court held "there was no evidence to sustain the verdict because . . . the plaintiff was unable to state the date (a pivotal point in the case) any more definitely that it was either on the 12th or near that date".[24] Nor are Gilbert's alleged statements such as to warrant an inference that he planned or participated in the violence. At the time these statements were made Gilbert had a right to do what he could by lawful means to prevent the replacement of striking Coal Valley employees and forestall the replacement of UMW by a company favored union. This

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[24] It is significant that this testimony was not relied upon by the District Court nor by Gibbs in the Court of Appeals and was not discussed in briefs or argument. Indeed, in Gibbs' Main Brief in the Sixth Circuit this admittedly vague recollection or impression was tacitly abandoned with the statement that "undisputably it appears that Gilbert . . . went to Middlesboro . . ." (Gibbs' Main Brief, p. 61).

It is noted, though these matters were pointed out in UMW's petition for certiorari in this case, that nowhere in Gibbs' reply was this crucial language in the Sixth Circuit's opinion defended or even mentioned.

was the tenor of his statements and the undoubted legitimate purpose of the non-violent picketing which was going on at that time.

This evidence clearly fails to satisfy the requirement of "clear proof" of "actual participation". Indeed, the existence of clear proof is negatived by the Sixth Circuit's observation (R. 529) that, "The proofs were *sketchy* as to the defendant's responsibility for the described conduct."

The Sixth Circuit alternatively predicated liability on events subsequent to the violence. Admittedly Gilbert was directed by District 19 to return to the field and to advise the employees to conduct themselves in a lawful and peaceful manner. And though the number of pickets was subsequently limited and no picket line disorder thereafter occurred (see the Statement of the Evidence herein, pp. 14-16), the Sixth Circuit found in the conduct of Gilbert evidence of ratification of the prior violence because, as it was said, UMW thereby secured the "fruits of violence", and because "we gain the impression that the threat of violence remained throughout the succeeding days and months." The Court said (R. 535):

> " . . . The night and day picketing that followed its spectacular beginning was but a guaranty and warning that like treatment would be accorded further attempts to open the Gray's Creek area. The aura of violence remained to enhance the effectiveness of the picketing. Certainly there is a threat of violence when the man who has just knocked me down my front steps continues to stand guard at my front door."

Laying aside the questions of whether an "impression", in these circumstances, partakes of clear proof of ratification, or of Gilbert's authority to ratify, we submit that the considerations utilized by the Sixth Circuit place a labor organization, confronted with the difficult task of representing and advising employees in these circumstances, in an impossible situation. UMW was faced with the choice

of abandoning its members or of restoring order. It did the latter and the fact is that from that point on no violence occurred.

UMW obviously could not erase what had transpired. We do not understand, however, that in these circumstances it was required to forego the right to picket in an orderly manner. As this Court held in *Youngdahl* v. *Rainfair, Inc.*, 335 US 131 (1957), it is one thing to restrain the illegal aspects of picketing under state law, but it is another to restrain all picketing. The Sixth Circuit in effect did just that, for it found in the subsequent picketing a basis for damages under state law.

We insist that there is nothing in a union's instructions not to engage in violence and not to engage in mass picketing, coupled with the absence thereof, which warrants a finding of "adoption or affirmance . . . of a prior act" as is required to establish ratification. 3 Am. Jur. 2d, Agency, Sec. 160.

A question of ratification somewhat similar to that here was considered by this Court in *United Mine Workers of America* v. *Coronado Coal Company*, 259 US 344 (1922). The Court said (p. 394):

> "It does appear that in 1916, after Stewart, the president of District 21, had been convicted of conspiracy to defeat the injunction issued to protect the Prairie Creek mines in this conflict, and had gone to the penitentiary and was pardoned, White, the national president, wrote a letter thanking the president for this, and that subsequently he appointed Stewart to a position on a district committee. It would be going very far to consider such acts of the president alone a ratification by the International Board, creating liability for a past tort."

UMW had a legitimate reason to involve itself, wholly apart from ratification of the prior violence. Simply to insist upon and achieve order was a sufficient reason. The circumstances under which the company sought to replace

UMW members was another. Indeed, the NLRB (though not the Sixth Circuit) sustained UMW's subsequent charge that the coal companies unlawfully assisted Southern Labor Union in their combined efforts to displace the striking Coal Valley employees. The doctrine of ratification is therefore inapplicable for "Ratification cannot . . . be inferred from acts which may be readily explained without involving any intention to ratify." 3 Am. Jur. 2d, Agency, Section 170. See also *UMW* v. *Coronado Coal Company*, 259 U.S. 344, *International Ladies Garment Workers* v. *NLRB*, 237 F. 2d 545 (CADC, 1956).

Reliance on ratification is misplaced because of the absence of evidence of an intention to ratify, as we have shown. It is also error because there is no evidence that the Coal Valley miners were purporting to act as agents of UMW on August 15 and 16. In the absence of this fact, the doctrine of ratification is inapplicable. 3 Am. Jur. 2d, Agency, Sec. 171. It is also inapplicable because of the absence of evidence to the effect that UMW had knowledge of all of the material facts concerning August 15 and 16, hence another fundamental element of ratification is lacking. 3 Am. Jur. 2d, Agency, Sec. 173.

4. The judgment based on state law herein is contrary to the doctrine of federal preemption.

Federal preemption has played a notable role in litigation growing out of labor controversies. Decisions are to the effect that absent overriding state interest, such as that involved in the maintenance of domestic order, state courts and federal courts in passing on state law claims, must defer to the exclusive competence of the National Labor Relations Board where the subject matter of the litigation is arguably subject to the protection or prohibitions of the National Labor Relations Act. Preemption has been found applicable to claims based on state law for equitable relief, *Garner* v. *Teamsters Union*, 346 U.S. 485 (1953), *Youngdahl* v. *Rainfair, Inc.*, 355 U.S. 131 (1957), as well

as to claims for damages, *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), *Teamsters Local 20* v. *Morton*, 377 U.S. 252 (1964).

While state law is not preempted in cases where there is an overriding state interest involved and violent primary activity has been found a basis for application of state law notwithstanding the same conduct may also be regulated by Sec. 8(b)(1)(A) of the Act [*United Construction Workers* v. *Laburnum Corp.*, 347 US 656 (1954), and *United Automobile Workers* v. *Russell*, 356 US 634 (1958)], judgments for damages under state law were sustained in both of these cases because, and only because, as this Court stated in the *Garmon* case, 359 US 236, 247 fn. 6 *state jurisdiction* was exercised only to compensate for the "direct consequences of violent conduct", and that "to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy." Moreover, *Laburnum* and *Russell*, upon which the Sixth Circuit expressly relied, are not apposite herein. *Laburnum* and *Russell* involved activities regulated, not by Section 303 or its counterpart, Section 8(b)(4), but by Section 8(b)(1)(A), 29 USC 158(b)(1)(A), and constituted violent primary conduct alone for which Congress had provided no action for damages. In *Laburnum* this Court reasoned that for Laburnum's damages Taft-Hartley "sets up no general compensatory procedure." In the instant case, which involves also secondary activity, Congress was not indifferent to the phase of damages resultant from such conduct, whether peaceful or violent, and provided therefor in Section 303. *Laburnum* and *Russell* are not applicable for an additional reason, namely, because state jurisdiction therein was exercised only to compensate for "the direct consequences of violent conduct" (*Garmon*, 359 US 236) and not, as in the instant case, for *total* strike activity, including *non-violent* conduct.

While the Sixth Circuit found "no need" to review the determination of the secondary boycott claim, it nonetheless employed its "impression that the threat of violence" and the "aura of violence remained" (R. 535) on which to warrant its conclusion "that violence was part of the common-law tort" and therefore federal preemption was inapplicable.

However, both the jury and the district court found that the secondary boycott statute (Section 303) had been violated and if it be true, as the Sixth Circuit states (R. 532-33a), that the *"same facts"* were available to determine whether a secondary boycott or a common-law tort was committed, then clearly the doctrine of federal preemption precluded jurisdiction over the common-law claim of violent secondary activity. Further, since, as the Sixth Circuit professed, the *"same facts"* were available for either claim, it is evident that the Sixth Circuit fails to distinguish between violence which attends primary picketing and that which accompanies secondary activity, in order to find jurisdiction of a state common-law tort claim. This distinction is of significance herein where the jury's finding of punitive damages and the district court's sanction of a portion thereof are based upon the belief that picketing fell within the conduct condemned under Section 303. The Sixth Circuit's affirmance of punitive damages as allowed by the district court and its rejection of UMW's argument that *Morton* (377 US 615) demanded a separation of the facts of federal and non-federal claims, because, as the Sixth Circuit said, *Morton* involved no charge of state common-law violence, make clear the Sixth Circuit's belief that violence, whether accompanying (1) primary picketing or (2) secondary picketing, gives rise to a common-law tort claim warranting punitive damages.

This Court made clear in *Morton* that punitive damages for Section 303 violations "conflict with the congressional judgment, reflected both in the language of the federal

statute and in its legislative history" and that "insofar as punitive damages . . . were based on secondary activities which violated only state law, they cannot stand, because . . . substantive state law in this area must yield to federal limitations" (377 US 260-61). *Morton* cites with approval the Fourth Circuit's *UMWA* v. *Patton*, 4 Cir., 211 F. 2d 742, 747-50, which rejected a punitive damage award under Section 303.

Clearly it was not Congress' intention that violence accompanying secondary picketing be extracted from such activity so as to become the basis in whole or in part for a separate and nonfederal cause of action or claim for punitive damages. Yet, this is precisely what the Sixth Circuit has achieved. Its result counters not only Congress' express language in Section 303 that a person damaged by conduct proscribed therein "shall recover the damages by him sustained", but it conflicts with the rule that "Whatever Congress determines, either as to a regulation or the *liability* for its infringement *is exclusive of state authority.*" *Sherlock* v. *Alling*, 93 US 99, 104.

We have shown that UMW neither authorized, participated in nor ratified the unlawful acts of violence which were shown to have occurred at the outset of this controversy. To the contrary UMW restored order and supported its members in picketing which was carried on in a lawful manner. It did these things to accomplish a lawful purpose—to obtain job protection for its members and other benefits of a collective bargaining agreement.

Even if UMW somehow did ratify the unlawful conduct of August 15 and 16, it does not follow that State law may be applied so as to condemn UMW's entire effort in this controversy. Elsewhere we have stated the various facts that were shown in support of Gibbs' state cause of action. These facts related to peaceful picketing of long duration, efforts to obtain a collective bargaining agreement, UMW's policy with respect to a uniform collective bargaining agree-

ment, the relief given by UMW to its members during the course of this controversy, as well as other matters. Obviously these matters upon which the judgment rested, at least in part, were beyond the scope of state regulation.

This Court has rejected the so-called "totality of effort rule", the use of which was implicit in this case. As was stated by this Court in the *Morton* case (377 U.S. 261-62):

> ". . . the District Court was without power to award damages proximately caused by lawful, primary activities, even though the petitioner may have contemporaneously engaged in unlawful acts elsewhere".

The conduct of UMW here before the Court was traditional union activity and is protected by the Labor Management Relations Act. So viewed, it is clear without argument that the judgment based thereon conflicts with the preemption doctrine. Furthermore, the judgment affirmed by the Sixth Circuit includes both compensatory and punitive damages and was entered for total strike activity, some of which admittedly was peaceful. *Garner* (346 US 483) denies the availability of jurisdiction for damages under a common-law claim which is based upon peaceful conduct.

Morton, we believe, represents a logical extension of this Court's decisions in the Garmon and Rainfair cases, for in the latter case it was held that federal preemption continues operative notwithstanding the occurrence of public disorder in the labor dispute.

It must be remembered too that the *Laburnum* and *Russell* exceptions to the doctrine of federal preemption authorizes only the award of damages which are "the direct consequences of violent conduct". *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236 (1959). But, Gibbs' jury award of $60,000 as compensatory damages for a state law violation, though reduced to

$30,000 by the district court, gave Gibbs a great deal more than compensation for the direct consequences of *violent* conduct, since none of the violence alleged imparted upon Gibbs personally and he suffered no physical injury.

For these reasons we earnestly submit that the judgment herein is contrary to the doctrine of federal preemption.

Question No. Three

UMW Is Entitled to a New Trial Because of the Closing Argument of Gibbs' Counsel.

UMW made a motion for a new trial because of the highly inflammatory and prejudicial closing argument made by plaintiff's counsel (R. 37a).

The District Court found the argument improper stating that "an advocate may share his client's *prejudices* (emphasis supplied) against an adversary, he cannot properly share them with the jury, particularly when they do not relate to any matters in evidence". However, the Court found the argument was not so prejudicial as to warrant a new trial but was of the opinion it should be taken into consideration upon the issue of excessiveness of the verdict.

The District Court noting Gibbs' employment contract was terminable at will, found the jury's award of $60,000 clearly excessive to the extent of $30,000, and in reviewing the evidence and "reflecting upon the argument of the plaintiff's counsel" found excessive in the amount of $55,000 the size of the award of $100,000 for punitive damages. The District Court's suggested remittitur of $30,000 on the employment contract and $55,000 of the punitive award was accepted by Gibbs.[25]

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[25] The District Court found no credible evidence to support the award of $14,029 for loss of his trucking contract and therefore sustained UMW's motion for a directed verdict on this issue.

The Sixth Circuit, although recognizing as sound those decisions[26] holding that where an excessive verdict results from appeals to passion, prejudice, or caprice, a remittitur may not be employed to cure the error, held that "The peculiar nature of many of the remarks leads us to conclude that he (the District Court) found the remarks to fall within the very narrow category calculated to influence the size of a favorable verdict without affecting the determination on the merits" (R. 536a).

The closing argument was replete with assertions calculated to arouse every conceivable sentiment against UMW. It was elaborately asserted that UMW was utterly without respect for the law—that "they will do what they please, the law doesn't mean (snaps fingers) that to them" (R. 482a); that UMW was utterly heartless and without regard as to whether innocent people starved (R. 486-487a); its very efforts to defend itself in this case was a part of the scheme "to bludgeon Gibbs" (R. 491a); that it was the "bugger" responsible for poverty in the coal fields (R. 486-487a). Virtually the entire argument was an appeal to prejudice to the jury. Typical of the "waving the bloody shirt" tactics employed is the following excerpt from the argument: "Now what this International Union has done, using these locals, has conspired to destroy that man, to bludgeon him, the same thing as taking a baseball bat and say we defy you Paul Gibbs, to prove this case. We'll beat you to a bloody pulp before you are through. If we can't do it with shotguns, we'll use every legal means to do it, and we'll either bludgeon you out of this case or we'll starve you out, one of the two." (R. 490a).

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[26] *Minneapolis, St. P. & S.S.M. Ry.* v. *Moquin*, 283 U.S. 520, 75 L. ed. 1243 (1931); *Ford Motor Co.* v. *Mahone*, 205 F. 2d 267 (CA 4, 1953); *Brabham* v. *Mississippi ex rel. Smith*, 96 F. 2d 210 (CA 5, 1938), cert. denied, 305 U.S. 636, 83 L. ed. 409 (1938); *National Surety Co.* v. *Jean*, 61 F. 2d 198 (CA 6, 1932).

There were neither allegations nor proof of destruction of property in this case, yet counsel's argument contained the following statement (R. 491a):

> "Certainly, they want you to be light on them so they can pay it back and go over there and blow up another mine . . .".

UMW was compared unfavorably with Hungary and Russia (R. 493a). Its dues policy was described as a scheme to gain profits. Counsel argued "... this union has been collecting $4.50 per month from each one of these members, some of them as long as thirty years. I haven't seen them sending any money back to them, have you? What this International seeks to do is profit . . ." (R. 485a).

The argument produced its calculated result—a verdict, and an excessive one. The same emotion that caused this jury to be excessive in the amount of its award was present when it made its determination against UMW on the merits. The human mind is not and cannot be compartmentalized to react as the Sixth Circuit's decision would require.

The field of labor-management relations is one that is particularly vulnerable to this type of appeal. The role that organized labor plays in our economic, political and social life and the regulation of that role is still a matter of continuing controversy. Combined with this sensitive field is a complex, vague and difficult law to apply. The Sixth Circuit described as "an effective understatement" this Court's observation in the *Electrical Workers* case [*Local 761, IUE* v. *NLRB*, 366 U.S. 667, 673 (1961)] that the distinction between legitimate "primary activity and banned secondary activity does not present a glaringly bright light". Surely, such issues must be free of prejudicial determinations.

Furthermore, the issue of union responsibility for the acts of employee members, particularly when enmeshed

with the general and vague concept of conspiracy, adds more complexity and more confusion. Present here also was the Sixth Circuit's notation that the "proofs were sketchy as to defendant's responsibility for the described conduct" (R. 529). This, too, comes within the category of an "effective understatement".

There was no assertion or finding that the excesses of the jury was based upon any factor other than the appeal to prejudice. UMW assets it is entitled to a verdict above suspicion on all issues and, as expressed by the Fourth Circuit in *Ford Motor Co.* v. *Mahone*, 205 F. 2d 267, 272, "Verdicts of juries must be kept above suspicion and a judge should not hesitate to set a verdict aside where it is so grossly excessive as to be explained only on the basis of sympathy or prejudice . . . which brings the fairness of the verdict under grave suspicion." Litigants are entitled to a fair judgment on all issues. And where, as here, argument is found to have been based upon an appeal to prejudice with an adverse effect upon the size of the verdict it should be set aside, for the means employed "may be quite effective to beget a wholly wrong verdict as to produce an excessive one." *Minneapolis, St. Paul & S.S.M. Railway Co.* v. *Moquin* (1931), 283 U.S. 520.

The narrow distinction employed by the Sixth Circuit in approving the use of a remittitur serves neither the justice of the case nor the administration of justice as it is reflected in trial practice.

Question No. Four

Having Submitted an Erroneous Theory to the Jury the Verdict May Not Be Sustained on Another Theory Which Was Proper to Submit to It.

The District Court refused to grant UMW's Motion to Dismiss Gibbs' complaint (R. 23a, 77a, 67a, 71a) and erroneously instructed the jury that if the object of the union's activity was to force or to require Grundy to cease doing business with Gibbs as a mine superintendent or as

a trucking contractor then such conduct was in violation of the Labor Management Relations Act (R. 496a, 501a).

In addition, the District Court instructed the jury that Gibbs could recover damages for the loss of his employment contract if they found UMW responsible for an illegal secondary boycott *or* a wrongful interference with this contract under the state common law (R. 501a).

The verdict form required the jury to answer eleven interrogatories (R. 31a, 34a). In answering these it found UMW violated both federal and state law as to Gibbs as a mine superintendent and as a trucking contractor.

The District Court agreed with UMW's contention that it erred in submitting the issue to the jury on the federal statutory claim as mine superintendent but disagreed with UMW's assertion that it was error to submit the issue as to Gibbs as a trucking contractor. Furthermore, it refused to grant UMW's request for a new trial finding the verdict could be sustained under the theory of his capacity as a trucking contractor or could be sustained under state law[27] (R. 53-55a).

UMW asserts that having submitted an erroneous theory to the jury it could only be cured by a new trial even though the verdict might be sustained on another theory which was proper to submit to it. *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19; *Local 978, United Bro. of Carpenters & Joiners* v. *Markwell*, 305 F. 2d 38 (CA 8, 1962). The Sixth Circuit did not refer to this issue.

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[27] The District Court held that employees and supervisors of any struck or picketed primary employer who lose their employment are not within the meaning of "other persons" and would have no statutory action for any loss so occasioned but Gibbs in his capacity as an independent trucking contractor would be an "other person" within the meaning of the Act and would be entitled to a statutory action under the law. (R. 53a, 54a).

It is impossible to determine from the verdict form whether the jury found Gibbs sustained his loss of the employment contract because of the secondary boycott as to Gibbs in either of his capacities or because of the common law violation or any part of it. The jury may well have believed that only the picketing subsequent to August 16 constituted a secondary boycott and that this picketing caused Gibbs to lose the eight years of salary it awarded him. It may have reasoned that the activities of August 15 or 16 violated the state common law and not the federal law but he suffered no loss for this conduct because he was paid $300 by Grundy for this time (R. 121a).

UMW therefore submits a new trial should be granted.

CONCLUSION

UMW submits this Court should reverse and set aside the judgment of the Sixth Circuit herein complained of (R. 540a), as well as the District Court's judgment of August 28, 1963 (R. 59-60a), set aside the jury verdict, and remand the case with directions that judgment be entered for UMW, for the reasons discussed in Question Two; or, alternatively, with instructions to dismiss for want of jurisdiction, for the reasons discussed in Question One; or, in the further alternative, that UMW be granted a new trial, for reasons discussed in Questions Two, Three and Four.

Respectfully submitted,

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APPENDIX A

Labor Management Relations Act, 1947 (29 USC):

Sec. 158. Unfair labor practices

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or ap-

proved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

§ 187. Unlawful activities or conduct; right to sue; jurisdiction; limitations; damages

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b) (4) of this title.

(b) Whoever shall be injured in his business or property by reason or[1] any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit. June 23, 1947, c. 120, Title III, § 303, 61 Stat. 158; Sept. 14, 1959, Pub.L. 86-257, Title VII, § 704(e), 73 Stat. 545.

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[1] So in original. Probably should read "of."

APPENDIX B

Section 12 of H. R. 3020 as found in Legislative History of the Labor Management Relations Act, Vol. 1, pp. 204-207:

"SEC. 12. (a) The following activities when affecting commerce, shall be unlawful concerted activities:

"(1) By the use of force or violence or threats thereof, preventing or attempting to prevent any individual from quitting or continuing in the employment of, or from accepting or refusing employment by, any employer; or by the use of force, violence, physical obstruction, or threats thereof, preventing or attempting to prevent any individual from freely going from any place and entering upon an employer's premises, or from freely leaving an employer's premises and going to any other place; or picketing an employer's place of business in numbers or in a manner otherwise than is reasonably required to give notice of the existence of a labor dispute at such place of business, or picketing or besetting the home of any individual in connection with any labor dispute.

"(2) Picketing an employer's premises for the purpose of leading persons to believe that there exists a labor dispute involving such employer, in any case in which the employees are not involved in a labor dispute with their employer.

"(3) Calling, authorizing, engaging in, or assisting—

"(A) any sympathy strike, jurisdictional strike, monopolistic strike, or illegal boycott, or any sit-down strike or other concerted interference with an employer's operations conducted by remaining on the employer's premises;

"(B) any strike or other concerted interference with an employer's operations, an object of which is to compel an employer to accede to featherbedding practices;

"(C) any strike or other concerted interference with an employer's operations, an object of which is (i) to compel an employer to recognize for collective bargaining a representative not certified under section 9 as the representative of the employees, or (ii) to remedy practices for which an administrative remedy is available under this Act, or (iii) to compel an employer to violate any law or any regulation, order, or direction issued pursuant to any law.

"(4) Any conspiracy, collusion, or common arrangements between competing employers to fix or agree to terms or proposed term of employment of their employees, or to subject such terms or proposed terms of employment to common control or approval, not permitted as to their employees, or as to the representatives of their employees, with respect to the collective bargaining, concerted activities, or terms of collective bargains or arrangements of such employees.

"(b) Any person injured in his business, person, or property by an unlawful concerted activity affecting commerce may sue the person or persons responsible therefor in any district court of the United States having jurisdiction of the parties, without regard to the amount in controversy, and may recover the damages sustained by him as a result of such unlawful concerted activity, together with the costs of the suit, including a reasonable attorney's fee.

"(c) No provision of the Act of March 23, 1932, entitled 'An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes', shall have any application in any action or proceeding in a court of the United States involving any activity defined in this section as unlawful.

"(d) A person who is found to have engaged in any activity herein defined as an unlawful concerted activity shall be subject to deprivation of rights under this Act to

the same extent as a person found to have engaged in an unfair labor practice under section 8(b) or 8(c).

"(e) Except as specifically provided in this section, nothing in this Act shall be construed to diminish the right of employees to strike or to engage in other lawful concerted activities. No provision of this Act, and no order of any court issued hereunder, shall be construed to require any individual to perform labor or service without his consent."

APPENDIX C

29 USCA Sec. 102 (Sec. 2 of the Norris-LaGuardia Act):

§ 102: PUBLIC POLICY IN LABOR MATTERS DECLARED

In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or

protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted. Mar. 23, 1932, c. 90, § 2, 47 Stat. 70.

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29 USCA Sec. 104 (Sec. 4 of the Norris-LaGuardia Act):

§ 104: ENUMERATION OF SPECIFIC ACTS NOT SUBJECT TO RESTRAINING ORDERS OR INJUNCTIONS

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title. Mar. 23, 1932, c. 90, § 4, 47 Stat. 70.

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29 USCA Sec. 106 (Sec. 6 of the Norris-LaGuardia Act):

§ 106: RESPONSIBILITY OF OFFICERS AND MEMBERS OF ASSOCIATIONS OR THEIR ORGANIZATIONS FOR UNLAWFUL ACTS OF INDIVIDUAL OFFICERS, MEMBERS, AND AGENTS

No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof. Mar. 23, 1932, c. 90, § 6, 47 Stat. 71.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 243

UNITED MINE WORKERS OF AMERICA,
Petitioner,
vs.
PAUL GIBBS,

RESPONDENT'S REPLY BRIEF

To the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENT'S REPLY BRIEF

To the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

STATEMENT OF THE CASE.

The respondent does not differ with the statement of opinions below, the statements as to jurisdiction, the statements as to the statutes involved, and the general statement of the procedural history of the case and the decisions of the District Court and the Court of Appeals as set out in the petitioner's brief. Respondent does not

believe it necessary to be repetitious and copy these items in this brief, but does rely on them by reference as if fully copied in respondent's brief.

COUNTER STATEMENT OF THE EVIDENCE.

The respondent does not disagree with the statement of evidence as contained in petitioner's brief and in the reference made to the record of the case. The inferences as drawn by the petitioner from the facts in the record are not in agreement with the respondent's belief as to the inferences which might be drawn from the facts. Respondent believes that the case at bar was one involving concerted activities, and had an objective of instilling throughout the entire area a setting which was to intimidate and create widespread fear and tension in the coal fields. The respondent submits a counter statement of facts which should be used in conjunction with the facts as set out in the petitioner's brief.

Respondent, Paul Gibbs, for more than thirty-two (32) years prior to August 15, 1960, since he was fifteen years of age, had been engaged in the coal, or coal mining, or coal hauling business (89a).

On August 12, 1960, Paul Gibbs was employed by Grundy Mining Company as mine superintendent at the starting salary of Six Hundred ($600.00) Dollars per month and in the capacity of an independent operator was granted a coal hauling contract to haul the coal produced at Gray's Creek Mine at a price of seventy-eight (78¢) cents per ton (93a).

On Saturday, August 13, 1960, Waldon Schrum received information of the proposed opening of the Gray's Creek Mine by Paul Gibbs in Grundy Mining Company (457a). Waldon Schrum was the president of Local 5881, and he immediately tried to contact George Gilbert, District 19 representative, to tell him the information and advise

him of a called meeting of Local 5881 for Sunday, August 14, 1960 (465a, 457a).

On August 15, 1960, several members of Local 5881 went to the entrance of the Gray's Creek work site where they met the men employed by Grundy and persuaded them not to attempt to commence work. The persuasion being aided by a display of fire arms among the members of Local 5881 (99a-101a and 151a).

On August 16, 1960, a substantial number of men employed by Grundy reported to the mine site where they were met by a crowd, numbering from forty (40) to one hundred fifty (150) men, a large number of whom were carrying various types of fire arms, who again persuaded the men not to attempt to commence work. The persuasion, at this time, was brought home to the employees when one of their vehicles was fired upon and hit by one of the members of the mob. Paul Gibbs' truck was stopped as he drove along the Pocket Road when it reached the intersection of Gray's Creek by eight (8) to ten (10) men who ran along in front of the truck with guns raised to their shoulders and pointed at Mr. Gibbs. One of the members of the group opened the truck door, grasped Mr. Gibbs' arm and attempted to pull him from the truck while the remaining men maintained their weapons to their shoulders. Mr. Gibbs was detained for approximately two (2) hours during which time he was apprehensive as to who was going to hit or shoot him first. Later, he was escorted by a motorcade to the intersection of Coal Valley Road and Highway No. 108, a distance of approximately two (2) miles from the Gray's Creek entrance where he witnessed the beating of Johnny Cain and the burning of his brief case and other papers. Gibbs and Cain were escorted from this area through Palmer, Tennessee, up to the intersection of Highway No. 108 and Highway No. 185 before the mob agreed to release Mr. Gibbs (103a-110a and 151a-154a).

On August 17 or 18, 1960, a mob or a crowd of one hundred (100) to one hundred twenty-five (125) men gathered near the office of Tennessee Consolidated Coal Company, parent of Grundy Mining Company, at Palmer, Tennessee. Two (2) officers of the Company were harassed by the crowd, some of whom were carrying weapons. One of the Company officers was manhandled and cursed, and one of the crowd pointed a 30-30 carbine rifle at the officer as he was getting in his car. Attempts were made to block their car so they could not leave, and finally when they were about to leave, two (2) cars pulled in side by side in front of their car so they were not allowed to pass (232a, 247a-248a).

On August 22, 1960, a visitor to the area asked a group of men picketing near Highway No. 108 for George Gilbert, after recognizing Gilbert's car at the scene. George Gilbert came out of the woods and told the visitor he could not go down the Pocket Road, but suggested another route to the visitor's destination along which he would observe some of Gilbert's men, whom he was told to tell that it was alright to pass (159a-162a).

After these events, Paul Gibbs was forced to turn over the operation of his mine to one of his employees, and within a week or ten (10) days after the violence of August 15 and 16, a sack was burned at the mouth of the mine, which could suffocate workers in the mine if they stayed there long enough; and an exhaust fan belt which was cut several times (452a-454a).

Gray's Creek area is one of the best coal areas in the Sewanee coal scene, and it was contemplated that Grundy Mining Company would eventually open around ten (10) mines in the Gray's Creek area (201a, 215a). That after the violence and activities of August 15 and 16, and thereafter, Tennessee Consolidated Coal Company or Grundy Mining Company would not hire Paul Gibbs, because, had Paul Gibbs been hired, none of the mines

would have been open today (206a). Tennessee Consolidated Coal Company would not execute leases of prime coal bearing lands to Mr. Gibbs, because it would have been a waste of time as he would never have had the opportunity by himself to mine coal (214a-215a).

It was shown at the trial that George Gilbert told Paul Gibbs, "I want you to keep your damn hands off of that Gray's Creek area, and tell that Southern labor union that we don't intend for you to work that mine" (128a). George Gilbert also made statements to others in regard to Paul Gibbs that "Hell, we can't let that go on" and that "Paul was trying to bring in the other union" and that he (Gilbert) said, "He ain't going to get by with it" (219a). "Paul was trying to bring in the Southern labor union into the coal field" and he (Gilbert) said, "The union won't let him do it." "They have ways of preventing him from doing it," "and he seemed to think Gibbs was going to have to go," "and he said he had friends in high places that could move him out of the mine business" (257a-258a).

After this threshold success, picketing was maintained for a period of nine (9) months, seven (7) days a week, twenty-four (24) hours a day, at the entrance to the mine area (383a, 332a-333a).

SUMMARY OF ARGUMENT.

I.

This was an action for damages brought by the respondent for the violation of his lawful right to engage in a lawful business, free from the unlawful interference of the petitioner. The complainant, although alleging two grounds of recovery, one Federal ground and one State ground, alleges the violation of a single right and states only one cause of action. The District Court properly found that it had jurisdiction of the case for the alleged violation of a right protected by Federal Statute, which stated a cause of action established by the Federal Statute and under the doctrine of pendant jurisdiction, had jurisdiction of the Common Law action, under State law. The gist of an action brought under the Federal Statute and the Common Law tort are basically the same, and under both grounds, any invasion of respondent's rights by unlawful violent means is not protected by the Federal Statute.

II.

Liability for the unlawful activity of a union under both the provision of the Federal Law, 29 U. S. C. A. 187 (b), and under the Tennessee Common Law, for the unlawful interference with business relations is to be determined under the law of agency as it has been developed in Common Law. Mass picketing, violence and threats of violence of bodily harm are conduct which is an imminent threat to public disorder, and cannot be classified as traditional union activity which is protected by the Labor Management Relations Act, and thereby jurisdiction of a District Court or State Court is preempted by the Federal Statute. The conduct as shown in this case, definitely fell within the area where a State Court at the outset could have enjoined the violent con-

duct and even to have awarded damages under the State Law, for the consequences of such conduct as defined by the traditional law of torts. The District Court having jurisdiction, the damages which might be awarded under the State Law, both compensatory and punitive, were permissible. The totality of Effort Rule is not applicable in this case, as the use of peaceful picketing was not the cause of the injury to the respondent. Whether or not there had been peaceful picketing after the original violence is immaterial, as the original violent acts completed the tortious interference with the respondent's protected rights.

III.

The petitioner received a fair trial on all issues, both on the liability and damage aspect of the case. In a case where violence, such as the violence involved in this case, the facts in themselves are repugnant to common decency and fair play. The argument of respondent's counsel was not such that would prejudice or bias the jury toward the petitioner, and deprive him of a fair and honest trial. The Court did not find that argument of counsel was prejudicial in inciting passion or prejudice in the jury and the jury's determination of liability, but did feel that it should be taken into consideration on the excessiveness of the verdict. Any error which may have occurred, if any, for any improper remarks in argument by respondent's counsel, was cured by the District Court on petitioner's Motion for New Trial, in making a new trial conditional upon the respondent remitting a portion of the damage, which the District Court felt to be excessive, and thereby cured any error or counsel's argument.

IV.

When the answer to interrogatories are viewed in relation to the Court's instructions to the jury, and the record as a whole, the verdict of the jury is not inconsistent with

its answers to interrogatories. The jury was instructed that only actual damages could be recovered under the violation of the Federal Statute, but under the Common Law, that both actual and punitive damages might be recovered, and in the jury's answer to interrogatories, it found the Common Law and Federal Statute to be violated, but awarded damages only under the Common Law, the verdict and answers to interrogatories were consistent. The case was properly submitted to the jury, and no error was committed in submitting the case on both theories of recovery, in view of the District Court's instructions to the jury.

ARGUMENT.

QUESTION NUMBER ONE.

Did the Court Below Properly Invoke the Doctrine of Pendant Jurisdiction in Adjudicating the State Common Law Cause of Action.

The decision under review is one of a number of cases involving petitioner where the Sixth Circuit has approved the exercise of pendant jurisdiction.

This is a suit to recover damages from the petitioner for injury sustained by the respondent as a result of petitioner's alleged unlawful violation of the secondary boycott provision of the Labor Management Relations Act, Section 8 (b) (4) and 303 as amended, 61 Stat. 158, 73 Stat. 545, 29 U. S. C., Section 158 (b) (4) and 187, and the Common Law tort of unlawful interference with respondent's right to engage in a lawful employment and business under the laws of the State of Tennessee.

The complaint (R. 10 through 14, R. 32 and R. 30, 31) alleges two grounds of recovery, one Federal ground and one State ground, but only a single cause of action. The complaint alleges the violation of a single right, the right to engage in a lawful employment and business, free of unlawful interference by the petitioner and it is the violation of this right which constitutes the cause of action. In **Donnelly v. Jackson Brothers**, 2 Court of Civil Appeals 408 (1911), it was established in Tennessee law, that the malicious interference with the business or business relations of another, followed by a detriment, is an invasion of legal rights and is actionable tort under the Common Law as much as an actual trespassing upon the business premises. Respondent also cites **Dukes v. Local Union, No. 437**, 191 Tenn. 495, 235 S. W. 2d 7 (1959), and **Love and Amos Coal Company v. United Mine Workers**, ...

Tenn. App. ..., 378 S. W. 2d 430 (1963), Cert. denied 376 U. S. 971, 84 S. Ct. 1137 (1964).

It is also an established principle of law in Tennessee that it is unlawful to conspire to injure the lawful business of another. The Supreme Court of Tennessee in **McKee v. Hughes**, 133 Tenn. 459, defined a civil conspiracy as follows:

> "A civil conspiracy may be defined to be a combination between two or more persons to accomplish by concert of action an unlawful purpose or to accomplish a purpose not in itself unlawful by unlawful means; the damage caused by the jest in any action."

In support of the above statement, we also cite **Brumley v. Chattanooga Speedway**, 138 Tenn. 534 (....); **Hutton v. Waters**, 41 Tenn. C. C. A. 582 (....); **Duplex Printing Press Co. v. Deering**, 254 U. S. 443, 41 S. Ct. 172 (....).

Secondary boycott has conspiracy inherently in its nature. It is necessary for more than one person to engage in the proscribed conduct in order for the secondary boycott to come into existence and an interference with the right protected by the Federal Statutes. It is the respondent's contention that the facts to establish the violation are identical or substantially identical and actually are different only in name. The complaint clearly alleges two distinct grounds in support of a single cause of action and not two distinct causes of action.

The matter of a single cause of action with different grounds of relief is explained very thoroughly in the case of **Baltimore Steamship Company v. Phillips**, 274 U. S. 316, 47 S. Ct. 600 (1927), where it was ruled by this Court a suit in Federal Court involving a claim for personal injuries with a decision upon the merits was res adjudicata as to a second suit involving the same matter later brought in a State Court and based upon State law.

"The effect of a judgment or decree as res adjudicata depends upon whether the second action or suit is upon the same or different cause of action. . . . If upon the same cause of action the judgment or decree upon the merits in the first case is an absolute bar to the subsequent action or suit between the same parties, or those in privity with them, not only in respect to every matter which was actually offered and received to sustain the demands, but also as to every ground of recovery which might have been presented."

* * * * * * * *

"The injured respondent was bound to set forth in his first action for damages every ground of negligence which he claimed to exist, and upon which he relied, and cannot be permitted, as was attempted here, to rely upon them by piece-meal under successive actions to recover for the same wrong and injury."

* * * * * * * *

"* * * In either view, there would be but one single wrongful invasion of a single primary right of the plaintiff, viz., the right of bodily safety, whether the acts constituting such invasion were one or may, simple or complex."

"The cause of action does not consist of facts, but of the unlawful violation or a right which the facts show . . . The injured respondent was bound to set forth in his first action for damages every ground of negligence which he claimed to exist, and upon which he relied, and cannot be permitted, as was attempted here, to rely upon them by piece-meal in several actions to recover for the same wrong and injury."

Under the principles announced in **Baltimore Steamship Company v. Phillips**, 274 U. S. 316 (1927), only one cause

of action is alleged in the complaint, but two grounds of relief are alleged. This procedure is the correct manner in which to bring an action in a case of this type.

It is respectfully submitted that the decision of the District Court and the Sixth Circuit is correct and in accord with the rulings of this Court. The doctrine of pendant jurisdiction is a well-settled principle of law, first announced in **Siler v. L. & N. Railroad Company,** 213 U. S. 175, 29 S. Ct. 451, 53 L. Ed. 753 (1909), and later reaffirmed in the leading case of **Hurn et al. v. Oursler et al.,** 289 U. S. 238, 47 S. Ct. 586, 77 L. Ed. 1148 (1933), and in **American Fire and Casualty Co. v. Finn,** 341 U. S. 6, 71 S. Ct. 534, 95 L. Ed. 702 (1951), wherein it is clearly established that where two distinct grounds in support of a single cause of action are alleged, and the Federal ground is not plainly wanting in substance, the Federal Court, even though the Federal ground be not established, nevertheless, has jurisdiction to dispose of the case on the non-Federal ground. Jurisdiction is not defeated as the petitioners contend by the possibility that the allegations in the complaint might fail to state a cause of action on which the respondent might recover.

It has been pointed out by the Supreme Court on many occasions that the matter of jurisdiction of a lower Court to hear a case and the decision on merits thereof are two entirely different matters. **Bendirup v. Putty Exchange,** 263 U. S. 291, 44 S. Ct. 96. In **Levering and Garrigues Co. v. Morrin,** 289 U. S. 103, 47 S. Ct. 600, 77 L. Ed. 1062 (1933), this Honorable Court very positively stated that the question of jurisdiction of a Court is not based upon the facts developed in the case, but upon the allegations of the complaint.

> "If the bill of complaint sets forth a substantial claim, an action is presented within the Federal jurisdiction, however, the Court upon consideration,

may decide as to the legal sufficiency of the facts alleged to support the same."

and also

"The question of jurisdiction as thus limited is to be determined by the allegations of the bill and not by the facts as they may turn out or by decision of the merit. **Mosher v. Phoenix**, 287 U. S. 29, 53 S. Ct. 67, 77 L. Ed. 148, in cases cited."

In determining whether or not the District Court had jurisdiction to hear and determine this cause, the determination must be decided as of the time that the complaint was filed. **Mullen v. Torrence**, 9 (Wheat.) 537, ... L. Ed. 154 (1924), and **St. Paul Mercury Indemnity Co. v. Red Cab Company**, 303 U. S. 283, 58 S. Ct. 586, 82 L. Ed. 845 (1938). If jurisdiction exists, it is not contingent or a partial one. Having taken jurisdiction in the case, jurisdiction continues in the Court to dispose of all issues raised by the pleadings. **Bell v. Hood**, 327 U. S. 678, 66 S. Ct. 773, 90 L. Ed. 939 (1946); **Ober v. Gallaher**, 93 U. S. 199, 23 L. Ed. 829 (1876); **Armstrong Paint and Varnish Works v. Nu-Enamel Corporation**, 305 U. S. 315, 59 S. Ct. 191 (1938).

The petitioner's contention that the respondent's claim is unsubstantial, was not sustained by the District Court or the Sixth Circuit. The complaint definitely sets forth a substantial claim and does in fact raise serious questions of law and fact which the District Court could decide only after it had assumed jurisdiction of the claim. It is not required for the District Court to retain jurisdiction under the doctrine pendant jurisdiction, that the Federal claim be adjudged valid on the merits. The District Court having acquired jurisdiction under the substantial Federal claim, by use of the doctrine of pendant jurisdiction, should dispose of the entire controversy between the litigants. The doctrine of pendant jurisdiction does not require the complete identity of facts to

prove the Federal and non Federal claim in order that pendant jurisdiction might be retained, but only that the claim not be so unsubstantial as to be frivolous or that the Federal claim cannot be said to be obviously without merit or as pretty clearly unfounded. A Federal Court having asserted its jurisdiction to decide an action under a Federal Statute may, under its pendant jurisdiction, decide the action upon the State claim, even though on the merits of the case, it may ultimately decide that there is no cause of action under the Federal claim against the petitioner.

The petitioner contends that there are great similarities in **Teamsters Local No. 20 v. Morton,** 377 U. S. 252, 84 S. Ct. 1253 (1964), and the instant case as well as the other U. M. W. pendant jurisdiction cases. There is a similarity between the instant case and other cases involving the U. M. W., wherein pendant jurisdiction has been sustained by the Sixth Circuit, but there is little, if any, similarity between the instant case and the Morton case. In the Morton case, the unlawful conduct of the Union was free of any violence or coercion which would remove the unlawful activity of the Teamsters Union from under the protection of the Federal Labor Law Statutes. Accordingly, the recovery for any business losses caused by the Union's peaceful secondary activity proscribed by Section 303 was limited to compensatory damages as provided under the Federal Statute, whereas, in the instant case the pattern of conduct in the use of mass picketing, violence and threats of violence, to intimidate an entire area or section of a State in order that its objectives might be obtained without regard to the legality or illegality of their action sets the instant case apart from the cases of peaceful activities. No matter what the Union's objective might have been, the mass picketing, violence and threats of violence were not protected activities, either as primary picketing or secondary

boycott activities under either Federal or State law. The extension of violence and threats of violence to a front remote from an area or situs of an immediate dispute having as an objective of such violence and threats of violence, the interference with the business intercourse of others, does not escape a secondary boycott ban.

QUESTION NUMBER TWO.

The Judgment for Damages Under State Law Is Based on UMW's Participation in or Ratification of Picket Line Violence and Is Contrary to the "Clear Proof" Requirements of the Norris-LaGuardia Act and the Doctrine of Federal Pre-emption.

The petitioner contends it was error to award damages against it under State law for (1) there was no evidence under the applicable standard of proof of UMW participation in the violence on August 15 and 16; (2) UMW subsequent involvement in the dispute is not clear proof of ratification of prior violence; and (3) the imposition of liability under State law to UMW activities in the dispute conflicts with the doctrine of Federal Pre-emption.

The petitioner puts forth several contentions that the petitioner is not responsible for the unlawful picket line activity and violence absence direct proof of actual participation or actual ratification or actual authorization of the illegal union activities as required by the Norris-LaGuardia Act, 47 Stat. 71, 29 U. S. C. A. 196. The petitioner by stipulation admitted its responsibility for acts of its district representative, George Gilbert, performed in the scope of his employment. (This was an oral stipulation and was not in the written record other than in the opinion of the District Court and found on page 46 of the transcript of the record.)

The petitioners contend that since the case alleges a violation of the Secondary Boycott provision of the Labor

Management Relations Act and also a common law tort as a grounds of recovery. The provisions of Section Six (6) of the Norris-LaGuardia Act, 47 Stat. 71, 29 U. S. C. A. 106, are to be used to determine the question of agency and liability of the petitioner. Although a judgment be entered in a case under the common law of Tennessee and the federal ground not be sustained, it does not change the standard of proof required to prove agency either under the provisions of the Taft-Hartley Act or under the common law tort to the standard of proof required by Section Six (6) of the Norris-LaGuardia Act. Had the respondent sought an injunction against the alleged unlawful nonviolent activity of the petitioner the anti-injunction provisions of the Norris-LaGuardia Act might be applicable.

This action was based on two grounds of recovery, the ground based on a Federal Statute was brought under the provisions of the Taft-Hartley Act, as amended, specifically 29 U. S. C. 187 (b), 61 Stat. 158, which states as follows:

> "(b) Whoever shall be injured in his business or property by reason or any violation of sub-section (2) of this section may sue therefore in any District Court in the United States subject to the limitation and provision of Section 185 of this title without respect to the amount in controversy, or in any other Court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

And the second ground as previously stated was brought under the provision of the common law of Tennessee for the unlawful interference with employment and business relations of the respondent. The respondent did not request in the pleading any injunctive relief enjoining and/or prohibiting the petitioner from its alleged unlawful conduct. The test of agency to be applied under the

Labor Relations Act is contained in 29 U. S. C. 185 (e) and provides:

> "(e) For the purposes of this Section, in determining whether any person is acting as an agent of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

29 U. S. C. 187 (b) provides that the limitation and provisions of Section 301, 29 U. S. C. 185 shall be applicable to actions brought under that section, and 29 U. S. C. 185 (e) provides the test to be used to determine the question of agency. The history of the Act shows the intent of Congress was to apply to suits of this character the common law rules with respect to liability for acts of agent. **U. M. W. v. Patten,** 211 F. 2d 742, C. A. 4, 1954; **International Ladies Garment Workers Union v. N. L. R. B.,** C. A., 237 F. 2d 545, 99 U. S. App. D. C. 64 (1956).

In the case of the **United Mine Workers of America v. Patten,** 211 Fed. 2d 742, 4 C. A. (1954), the same contention of petitioner were made and the Fourth Circuit ruled that a Union is answerable for the unlawful acts of its agent within the scope of his employment, even though the specific unlawful acts are neither authorized or ratified by the Union. The Court in discussing and quoting the legislative history of the provisions of 29 U. S. C. A. 185, quoted from 93 Congressional Record, page 7001, on Legislative History of Labor Management Relations Act, Vol. 2, page 1622, the following:

> "Section 2 (2), 2 (13), and 301 (e): The conference agreement in defining the term employer struck out the vague phrase in the Wagner Act 'anyone acting in the interest of an employer' and inserted in lieu thereof the word 'agent.' The term agent is defined in section 2 (13) and section 301 (e), since it is used

throughout the unfair labor practice sections of title I and in sections 301 and 303 of title III. In defining the term the conference amendment reads 'the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.' This restores the law of agency as it has been developed in common law."

* * * * * * * *

"It is true that this definition was written to avoid the construction which the Supreme Court in the recent case of **United States against United Brotherhood of Carpenters** (12 Labor cases 51,241) placed upon section 6 of the Norris-LaGuardia Act which exempts organizations from liability for illegal acts committed in labor disputes unless proof of actual instigation, participation, or ratification can be shown. The construction the Supreme Court placed on this special exemption was so broad that Mr. Justice Frankfurter, speaking for the dissenting minority, pointed out that all unions need do in the future to escape liability for the illegal actions of their officers is simply to pass a standing resolution disclaiming such responsibility. The conferees agreed that the ordinary law of agency should apply to employer and union representatives. Consequently, when a supervisor acting in his capacity as such engages in intimidating conduct or illegal action with redating conduct or illegal action with respect to employees or labor organizers his conduct can be imputed to his employer regardless whether or not the company officials approved or were even aware of his actions. Similarly union business agents or stewards, acting in their capacity of union officers, may make their union guilty of an unfair-labor practice when they engage in conduct made an unfair labor practice in the bill, even though no formal action has been taken by the union to authorize or approve such conduct."

In the instant case, George Gilbert was identified by Mr. Albert Pass, Secretary-Treasurer of District Nineteen, as a District Nineteen Representative or what is commonly referred to as a field representative (R. 296a). When Mr. Pass received a telephone call from a Mr. Henry Turner advising the District of the situation (R. 298a), he and Mr. Riddings, District President, called Mr. Gilbert into his office and instructed Mr. Gilbert to go to the Gray's Creek area, make an investigation and see what the situation was and report back. Further, that if there was any picketing, he was to limit the picketing and see that none of the other mines were closed (R. 299, 300a). George Gilbert defined his duties as a field representative to be "well, the duties of a field representative is to organize the unorganized, settle grievances where the mine is under contract, keep the mine working according to the contract" (R. 326a).

Mr. Gilbert admitted that he laid the plans for the pickets to be cut down to three men per shift and where they would be located throughout the 24 hours of each day (R. 334a). Walden Schrum, President of Local 5881, United Mine Workers of America, received information that these mines were to be opened on the Saturday preceding Monday, August 15. He called a meeting of the Local Union for Sunday afternoon at 2:00 o'clock, and he also tried to get in touch with Mr. Gilbert to advise him of the circumstances (R. 455, 57). Mr. Schrum was present on the morning of August 15 and 16 in the Gray's Creek area and also in the Coal Valley area when the greatest part of the violence took place (R. 466-468).

On August 22, Sam Swope was in the area of the Gray's Creek Mine, and when he approached the area where the pickets were located, he did observe one rifle (R. 160). Mr. Swope observed Mr. Gilbert's car parked near the picket line and for that reason he asked to talk with Mr.

Gilbert. Mr. Gilbert then came out of the wooded area located on the left side of the road. Mr. Gilbert gave Mr. Swope directions to a road he could take to get into another coal mine and said there would be "some of his men there", and for Mr. Swope to tell the men that he said it was alright to go through (R. 161 and 162). John Higgins testified that on one occasion he saw Mr. Gilbert stop, open the trunk of his car and drop off food to the pickets on the picket line (R. 220, 222), and that shortly after the occurrence on August 15 and 16, George Gilbert stated that Paul Gibbs was trying to bring in another Union and that he wasn't going to get by with it (R. 219). Mr. Gilbert also made similar statements to Jim Campbell and that he had ways of preventing Gibbs from bringing in this other union (R. 256 and 257).

The Taft-Hartley Act expressly makes the International Union liable for the acts of its agents, employees and representatives for all business of the master. It is true no written document of any resolution of either the International Union United Mine Workers or District Nineteen authorizing or ratifying the unlawful Union activities was proven nor was evidence of a written resolution disaffirming said acts introduced by the petitioner. Seldom in a case involving Secondary Boycott or a common law conspiracy will written or direct evidence of the conspiracy be found. Acts done to give effect to a conspiracy may be in themselves lawful and wholly innocent acts, yet if they are part of the sum of the acts which the statute forbids, they come within the prohibition. **American Tobacco Co. v. United States**, 328 U. S. 781, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946). Further the question of whether there was an unlawful conspiracy or a Secondary Boycott is not to be determined by the process of segregation and isolated treatment of various activities engaged in by the petitioner. A conspiracy is to be viewed by the Court as a whole; the integral parts thereof are not to be weeded

out and inquired into separately. **United States v. Patten,** 226 U. S. 525 (1913).

Under the facts of the case, it was a case for the jury under Section 303, 29 U. S. C 187 of the Labor Management Relations Act, 61 Stat. 158, and the evidence was sufficient to establish that immediately upon the return to the area to settle the local dispute as directed by officers of District Nineteen, Mr. Gilbert took over control of the picketing and was acting within the scope of his employment when he made the declaration of intention of the petitioner to the various witnesses in regards the Gibbs problem.

The petitioner contends that under the Doctrine of Federal Pre-emption, the District Court would not have jurisdiction and was without power to award damages caused by the unlawful activities against the respondent. Reliance is made upon the case of **Local 20, Teamsters v. Morton,** 377 U. S. 615, 84 S. Ct. 1253 (1964). The petitioner says that the conduct of the Union here before the Court was traditional union activity and is protected by the Labor Management Relations Act. It is most strongly insisted by the respondent that the activities complained of by the respondent are not traditional union activities within any reasonable view of the Federal Statutes. As this Court stated in **International Union, United Automobile Workers v. Russell,** 356 U. S. 634, 78 S. Ct. 932, 2 L. Ed. 1030 (1958), that mass picketing, violence and threats of violence were not union activity protected by Federal law. Also in **United Construction Workers v. Laburnum Corporation,** 347 U. S. 656 (1954), 74 S. Ct. 833, 98 L. Ed. 1025. This Court drew the distinction between the provision of unfair labor practices and the compensation for tortious conduct of the union. The Court said that Congress has not prescribed procedure for dealing with consequences of tortious conduct already committed

and that the Act authorizes suits for unlawful strikes or boycotts in both Federal and State Courts. In **San Diego Building Trades Council, etc. v. Garmon**, 359 U. S. 236, 79 S. Ct. 773, 3 L. Ed. 755 (1959), a State Court's jurisdiction to award compensatory and punitive damages for violent union activity was reaffirmed although it was not applicable to the decision of the case.

> "It is true that we have allowed the States to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order. **International Union, United Automoble, Aircraft and Agricultural Implement Workers, etc. v. Russell**, 356 U. S. 634, 78 S. Ct. 932, 2 L. Ed. 2d 1030; **United Construction Workers, etc. v. Laburnum Const. Corp.**, 347 U. S. 656, 74 S. Ct. 833, 98 L. Ed. 1025. We have also allowed the States to enjoin such conduct. **Youngdahl v. Rainfair, Inc.**, 355 U. S. 131, 78 S. Ct. 206, 2 L. Ed. 2d 151; **United Automobile, Aircraft and Agricultural Implement Workers, etc. v. Wisconsin Employment Relations Board**, 351 U. S. 266, 76 S. Ct. 794, 100 L. Ed. 1162. State jurisdiction has prevailed in these situations because the compelling state interest in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction. We recognize that the opinion in **United Construction Workers, etc. v. Laburnum Const. Corp.**, 347 U. S. 656, 74 S. Ct. 833, 835, 98 L. Ed. 1025, found support in the fact that the state remedy had no federal counterpart. But that decision was determined, as is demonstrated by the question to which review was restricted, by the 'type of conduct' involved, i. e., 'intimidation and threats of violence'."

In **Teamsters Local 20 v. Morton**, supra, a case involving peaceful secondary activities which were proscribed

by the Federal Statute, compensation for damages for business losses caused by the union's peaceful secondary activities would be governed by the Federal Statute and be limited to compensatory damages. In a case involving extreme violence, threats of violence and intimidation, State law has been permitted to prevail and allowed to grant compensation for the consequences of such violent conduct as defined by the traditional law of torts. Under the laws of the State of Tennessee compensatory and punitive damages are permissible for the unlawful interference with the business or employment of another.

It is respectfully submitted that **Teamsters Local 20 v. Morton** did not reverse any of the principles of law set out in the cases of Laburnum and Russell. There is a very clear distinction between the instant case and the Morton case. In the Morton case there was evidence of lawful and unlawful secondary activities on the part of the union. Although unlawful activity, it was free of any violence on the part of the union. Therefore, the state law, if in conflict must yield to the Federal Statute and the state is without authority to award punitive damages. This is not the situation in the instant case. There was mass picketing, violence, threats of violence and death, intimidation and imminent threats of public disorder throughout the area. This type of conduct on the part of the union brings the case within the principle of Laburnum and Russell and a court, either state or Federal, may award both compensatory and punitive damages under the traditional law of torts.

There is also a distinction between the case at bar and the Morton case as relates to what may be subject to compensation either under Federal Statute or local law. The Morton case involved two types of secondary activities, one being unlawful and compensable under the statute, the second being lawful under the Federal Statute and non-compensable. The loss of a contract as in the Morton

case, without being a result of unlawful activities, is one of the methods of labor to bring pressure upon an employer and is protected. In the instant case, the loss of respondent's contract was due to the acts of violence and threats of violence, mass picketing and intimidation on the part of the union. The unlawful interference occurred at the threshhold of the campaign—the loss to the respondent occurred immediately after the violent show of force. The threats of violence and imminent threats of public disorder remained even though it may have appeared peaceful on the surface, and the loss to respondent was immediate and not as a result of the continued "peaceful picketing" for a long period of time. A close parallel to the present case is found in **Milk Wagon Drivers Union, etc. v. Meadowmoor Dairies, Inc.**, 312 U. S. 552, 61 S. Ct. 287 (1941), where peaceful picketing was accompanied by violence, this Court, in describing the effect of the activities upon the minds of men, said:

> "Back of the guarantee of free speech lay faith in the power of an appeal to reason by all the peaceful means for gaining access to the mind. It was in order to avert force and explosions due to restrictions upon rational modes of communication that the guarantee of free speech was given a generous scope. But utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force. Such utterance was not meant to be sheltered by the Constitution."
>
> * * * * * * *
>
> "And acts which in isolation are peaceful may be part of a coercive thrust when entangled with acts of violence. The picketing in this case was set in a background of violence. In such a setting it could justifiably be concluded that the momentum of fear generated by past violence would survive even though further picketing might be wholly peaceful."

QUESTION NUMBER THREE.

Is the Petitioner Entitled to a New Trial Because of a Closing Argument of Respondent's Counsel?

The petitioner contends that the argument by respondent's counsel was made with an intent to incite prejudice and passion in the minds of the jurors against the petitioner, thereby depriving them of a fair trial. This contention is based primarily on the fact that a sizeable verdict was returned by the jury and that a remittitur was suggested by the District Court ruling on the petitioner's motion for a new trial and the District Court's opinion that the remarks of counsel were improper but not prejudicial. The mere fact that a substantial verdict was rendered by the jury and that a remittitur was suggested should not be made the basis of any presumption that the trial court believed the jury was governed by prejudice or bias or engaged in a wilfull disregard of the evidence in determining the verdict. **Fairmount Glass Co. v. Cub Fork Coal Co.**, 287 U. S. 474, 53 S. Ct. 252, 77 L. Ed. 439 (1940). The District Court was of the opinion that counsel's argument was improper, but when viewed on the record as a whole, was not prejudicial to the rights of the petitioner and did not deny the petitioner a fair trial on the merits of the cause. Although remarks of counsel may be improper, of questionable propriety or reprehensible, such remarks under all the circumstances must be prejudicial to the rights of the other party to require reversal or granting a new trial. Examples of argument of counsel which have been reviewed and found not to be prejudicial are:

> "Argument that $25,000.00 meant nothing to defendant. **Sheffield Steel Corp. v. Vance**, 236 F. 2d 938 C. A. 8, 1956. If jury found for plaintiff, they would in effect accuse master and mate of being criminally negligent. **Morron v. Atlantic Refining Co.**, 176 F. 2d

313 (C. A. 3), 1949. Plaintiff's counsel's reference to a truck as 'Monster' or 'Battle Ship'. **Associated Petroleum Carriers v. Beall**, 217 F. 2d 607 (C. A. 5), 1955. 'The casualties in war are provided for by a grateful Government. I leave it to you to say as an illustration of industry and its gratitude for one whose duty * * *' **Fleming v. Husted**, 164 F. 2d 65 (C. A. 8), 1947, cert. denied 333 U. S. 843, 68 S. Ct. 661, 92 L. ed. 1127. Argument picturing defendant as friend of poor against defendant who was pictured as exploiter of the defenseless. **Show Warehouse Co. v. Southern Railway Co.**, 294 F. 2d 850 (C. A. 5th), 1961, cert. denied 369 U. S. 850, 82 S. Ct. 933, 8 L. Ed. 2d 9. Characterization of defendant as a monster. **Smith v. McNulty**, 293 F. 2d 924 (C. C. A. 5th), 1961."

Ordinarily an Appellate Court will not upset a verdict for inadvertent or provoked, or other improper arguments which does not impress as having been made in bad faith unless the record as a whole and result at least indures conviction that the jury must, as a matter of sympathy, bias or prejudice, have been materially affected by it. **Sheffield Steel Corp. v. Vance**, 236 F. 2d 938 (C. A. 8th), 1956. The District Court in ruling on the motion for a new trial was of the opinion that the jury in reaching its verdict heeded the instructions given by the Court, that the jury reached its verdict in light of the facts presented by the evidence introduced in the trial and based its findings on the evidence. The District Court found the respondent was not entitled to recover the loss of prospective profits from the trucking contract as there was an absence of evidence which was of probative value because the exhibits prepared by the respondent to prove loss of prospective profits were based on the violation of the Tennessee Truck Weight Statute, and that there was evidence to sustain the verdict awarding damages for the loss of the employment contract (R. 56).

In argument, counsel may discuss the facts as proved or as admitted in the pleading, the conduct of parties, attack the credibility of witnesses, rebut the argument of opposing counsel, may legitimately appeal to the jury to perform their duty and to use caution in formulating their verdict so that there will not be inconsistency between the various parts. In view of the cautionary instructions given by the District Court at the time objection was made to respondent's counsel argument (R. 487, R. 490) and counsel's prompt abandonment of the argument which was objected to and the further cautionary instruction given the jury to eliminate from the deliberations of the jury any feelings of prejudice, sympathy or bias that the jury might have, for or against either party, and specifically cautioning that in the field of labor-management relations many people have personal feelings and strong opinions and urging them not to allow any personal feelings, sympathy or prejudices to divert the jury from deciding the case strictly on the basis of the evidence and on the law removed any effect that any improper remarks may have had on the jury.

The District Court reviewed respondent's counsel argument in a different perspective than petitioner and was of the opinion that the jury's verdict was excessive in view of the evidence relating to damages and not as a result of mistake, sympathy, prejudice or other improper motive on the part of the jury in determining liability. The question of excessiveness of verdict is primarily for the trial court and will not be disturbed unless the verdict is so grossly excessive that the denial by the trial court of a motion for new trial constitutes an abuse of discretion. **Trowbridge v. Abrasive Co. of Philadelphia**, 190 F. 2d 82 (C. A. 3), 1951. The District Court applied the well settled general rule where a jury's verdict appears to be excessive, a trial court may make an order denying a motion for a new trial upon the condition that the successful party remit a certain sum

from the verdict, as in the court's judgment would constitute just damages. **Dimick v. Schiedt,** 293 U. S. 474, 55 S. Ct. 296, 79 L. Ed. 630 (....); **Northern Pacific Railway Co. v. Herbert,** 116 U. S. 642, 6 S. Ct. 590, 29 L. Ed. 755 (....); **Koeningsburger v. Richmond Silver Mining Co.,** 158 U. S. 41, 15 S. Ct. 751, 39 L. Ed. 889; **Mills v. Scott,** 99 U. S. 25, 25 L. Ed. 294; **Arkansas Valley Land and Cattle Co. v. Mann,** 130 U. S. 69, 9 S. Ct. 458, 32 L. Ed 854; International Paper Co. v. Busby, 182 F. 2d 790 (C. A. 5), 1959; White Oak Coal Company v. UMW, 319 F. 2d 591 (6 C. A.), 1963.

The Sixth Circuit was of the opinion that the remarks of counsel fell within this area and agreed with the District Court (R. 536). It is respectfully submitted that the amounts of the verdict, for both compensatory and punitive damages, are not to be used as a indicator of bias, prejudice, passion or other misconduct on the part of a jury in its determination of the issues in a controversy. The argument and remarks of counsel were not designed to incite prejudice or passion on the part of the jury. The District Court properly exercised its authority and applied well established principles of law to cure what in its opinion was an excessive verdict by conditioning a denial of a new trial with the suggestion of a remittitur of that portion of the jury verdict which in its opinion was excessive and thereby eliminated by the exercise of this judicial discretion any excessiveness of the verdict.

QUESTION NUMBER FOUR.

Having Submitted an Erroneous Theory to the Jury, the Verdict May Not Be Sustained on Another Theory Which Was Proper to Submit to It.

The District Court, the petitioner and the respondent were fully aware of the many difficulties of trying a case

as the instant case and the danger of possible error which would result in having the case reversed by an appellate Court for such error. In an effort to prevent error, the District Court exercised its sound judicial discretion and decided to submit the case to the jury for a general verdict accompanied by special interrogatories, as is provided in 49 (b), Federal Rules of Civil Procedure, 29 U. S. C. Rule 49 (b). On November 13, 1962, a conference of the District Court, counsel for the petitioner and counsel for the respondent the questions to be submitted to the jury as special interrogatories and the verdict form to be used were fully discussed. The petitioner did not object to the questions to be submitted to the jury nor the form prepared by the District Court. The petitioner did not request any change in the questions to be submitted or any change in the verdict form. The petitioner did not submit or request to submit any additional questions or a different verdict form to the jury (R. 67a). After the case was submitted to the jury and a verdict was returned, the petitioner did not move at that time or before the jury was dismissed that the case be resubmitted to the jury for further deliberation in order to correct the alleged inconsistency in the answers to special interrogatories and general verdict. The respondent believes that the petitioner by its failure to act at the appropriate time waived any alleged error and definitely did not preserve its right to allege this as error at this time. By its failure to act, the petitioner waived its right to require presentation to the jury of any other issue which it now deems necessary for a proper decision of the case, and waiving its right to trial by jury upon any such questions it failed to submit, and the District Court would be authorized to make findings upon that point. **Safeway Stores v. Dial**, 311 F. 2d 595 (C. A. 5) (1963). **Penn v. Glenn**, 265 F. 2d 911, C. A. 6 (1959). **Merrill v. Beaute Vues Corp.**, 235 F. 2d 983, C. A. (1956); **A. M. Webb & Company v. Robert P. Miller Company**, 78 F. Supp. 24

(1948) (reversed on other grounds, 176 F. 2d 678); **Ribeiro v. United Fruit Company**, 284 F. 2d 372, C. A. (1960), Cert. denied 81 S. Ct. 905, 365 U. S. 872, 5 L. Ed. 2d 861 (1961). Upon examination of the verdict form (R. 31-34) the jury in answer to the special interrogatories found UMW guilty of violating the Federal Statute and also guilty of the Common Law tort of interference with business or contractual relations, and awarded both compensatory and punitive damages. The answers of the jury on the special interrogatories and the award of damages are not inconsistent. The jury awarded damages for the violation of one right and by its award of punitive damages it is apparent that the award of the jury was made for the Common Law tort. A close scrutiny of the instructions of the Court in its charge to the jury specified what damages could be awarded under the two grounds of recovery. The Court charged punitive damages could not be awarded by reason of a violation of the Labor Management Relations Act and that only actual damages could be awarded under the act. The Court further charged that punitive damages might be awarded under the Common Law if the necessary basis for punitive damages was found (R. 509-513). Under Rule 49 (b), Federal Rules of Civil Procedure, specific provisions are made for the course to be followed where there is an inconsistency between the general verdict and the answer to interrogatories. This particular point was before the Honorable Court in **Gallick v. B. & O. Railroad Company**, 372 U. S. 108, 83 S. Ct. 659, 9 L. Ed. 2d 618 (1963), and it was determined that if there be any inconsistency between the verdict and the jury's answer to interrogatories it is the duty of the Court to harmonize the answer, if possible, under a fair reading of the Court's instructions and the special verdict. The District Court did not find the answers to the interrogatories and the general verdict to be so contradictory or inconsistent that under a fair reading of the Court's instructions they could not be reconciled with the general

verdict. The principles to be followed by the District Court in reconciling any inconsistency between the answers to special interrogatories and the general verdict as established by this Court in **Gallick v. B & O Railroad Company**, supra, **Atlantic and Gulf Stevedores, Inc., v. Ellerman Line Limited**, 369 U. S. 355, 82 S. Ct. 780, 7 L. Ed. 798 (1962), **Arnold v. Panhandle S. F. R. Co.**, 353 U. S. 360, 77 S. Ct. 840, 1 L. Ed. 899 (...); and in **McVey v. Phillips Petroleum Company**, 288 F. 2d 53 (C. A. 5) (...); **Morris v. Penn. Railroad Co.**, 187 F. 2d 837 (C. A. 2) (...), were applied by the Court and any inconsistency, if any, was reconciled and the proper judgment entered.

The instant case is clearly distinguishable from **Sunkist Growers, Inc. v. Winckler and Smith Citrus Products Co.**, 370 U. S. 19 (1962). In the Sunkist case, the petitioner was charged with a violation of the Federal Antitrust Statutes and claimed an exemption from the application of the Antitrust Statutes by virtue of the Capper-Volstead Act. The instructions of the Trial Court to the jury were ambiguous in that it did leave open for the jury to base their verdict upon a finding of conspiracy between the Sunkist and Exchange Orange and Exchange Lemon, wholly owned subsidiary cooperatives within the provisions of the Capper-Volstead Act, and exempt from anti-trust regulations of the Sherman and Clayton Anti-Trust Acts, and therefore could not be conspirators with Sunkist. In the present case it is respectfully submitted that no error was made in the submission of the issues to the jury, or in the instructions of the Court or in the answers to interrogatories and general verdict which create any inconsistency or conflict to support the contention that the general verdict may have rested on an erroneous theory of liability. The petitioner contends that the jury may be considered or based its verdict on the premise that peaceful picketing cost Gibbs to lose "eight years of salary" it awarded him. This is specula-

tion on the part of the petitioner. The measure of damages for the violation of the common law tort as contended by the petitioner, although not specifically made a point or error, is not as the petitioner has reasoned in its argument and should not be used to infer the jury was guilty of misconduct in determining the merits of the case. The activities of August 15 and 16 were an aggravated and unjustified interference with the respondent's right, and shows a reckless disregard of respondent's rights and were in actuality malicious acts. The measure of damages under the situation presented in this case, is based on a Common Law tort and would be the direct and proximate result of the wrongful acts of the petitioner and not the measure of damages as would be awarded in an action for breach of contract. **Duke v. Brotherhood of Painters, Decorators, and Paper Hangers of America**, 191 Tenn. 495, 235 S. W. 2d 7 (1950); **United Auto Workers v. Russell**, supra, **United Construction Workers v. Laburnum**, supra; **Bryson v. Bramlett**, 204 Tenn. 347, 321 S. W. 2d 555 (1959). In an action brought for the redress of a wrong, intentionally, wilfully or maliciously committed, the wrong-doer will be held responsible for the injuries which he has directly caused even though they lie beyond the limits of natural apprehended results as might be the case where an injury was unintentionally, but negligently inflicted. **Milwaukee & St. P. R. Co. v. Kelloggs**, 94 U. S. 469, 475, 24 L. Ed. 256 (...); **Pratt v. Duck**, 28 Tenn. App. 502, 191 S. W. 2d 562 (1945); **Dukes v. Local Union 437**, supra. In cases where the wrong-doer has intentionally invaded the rights of another, damages for such acts will not be limited to damages as established for a breach of contract or tort arising out of a negligent act, but will cover all the consequences resulting from intentional acts. The effect of the acts of August 15 and 16 were the controlling facts of the interference with respondent's rights and the later peaceful picketing did not contribute to the success or failure of the intended

results. The invasion of respondent's rights, although continuing in its effect, was accomplished in the first few days of the petitioner's campaign and the subsequent events, peaceful picketing, did not add or detract from the effect of the threshold success already acquired by the petitioner.

CONCLUSION.

Respondent submits that this Court should affirm the judgment of the Sixth Circuit as well as the District Court's judgment of August 28, 1963.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 243.—October Term, 1965.

United Mine Workers of America, Petitioner, *v.* Paul Gibbs.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[March 28, 1966.]

Mr. Justice Brennan delivered the opinion of the Court.

Respondent Paul Gibbs was awarded compensatory and punitive damages in this action against petitioner United Mine Workers of America (UMW) for alleged violations of § 303 of the Labor Management Relations Act, 1947,[1]

[1] Section 303 of the Labor Management Relations Act, 1947 provides:

"(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158 (b) (4) of this title.

"(b) Whoever shall be injured in his business or property by reason or any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit." 73 Stat. 545, 29 U. S. C. § 187 (1964 ed.).

Section 158 (b) (4) of Title 29 U. S. C. (1964 ed.), § 8 (b) (4) of the National Labor Relations Act, as amended, 73 Stat. 525, provides, in relevant part, that:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

. . . . .

"(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise, handle or work on any goods, articles, materials, or commodities

and of the common law of Tennessee. The case grew out of the rivalry between the United Mine Workers and the Southern Labor Union over representation of workers in the southern Appalachian coal fields. Tennessee Consolidated Coal Company, not a party here, laid off 100 miners of the UMW's Local 5881 when it closed one of its mines in southern Tennessee during the spring of 1960. Late that summer, Grundy Company, a wholly owned subsidiary of Consolidated, hired respondent as mine superintendent to attempt to open a new mine on Consolidated's property at nearby Gray's Creek through use of members of the Southern Labor Union. As part of the arrangement, Grundy also gave respondent a contract to haul the mine's coal to the nearest railroad loading point.

On August 15 and 16, 1960, armed members of Local 5881 forcibly prevented the opening of the mine, threatening respondent and beating an organizer for the rival union.[2] The members of the local believed Consolidated

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or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

. . . . .

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title; *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . . ."

[2] These events were also the subject of two proceedings before the National Labor Relations Board. In one, the Board found that Consolidated had unlawfully assisted the Southern Labor Union in violation of § 8 (a)(2) of the National Labor Relations Act, as amended, 49 Stat. 452, 29 U. S. C. § 158 (a)(2) (1964 ed.), *Ten-*

had promised them the jobs at the new mine; they insisted that if anyone would do the work, they would. At this time, no representative of the UMW, their international union, was present. George Gilbert, the UMW's field representative for the area including Local 5881, was away at Middlesboro, Kentucky, attending an Executive Board meeting when the members of the local discovered Grundy's plan;[3] he did not return to the area until late in the day of the sixteenth. There was uncontradicted testimony that he first learned of the violence while at the meeting, and returned with explicit instructions from his international union superiors to establish a limited picket line, to prevent any further violence, and to see to it that the strike did not spread to neighboring mines. There was no further violence at the mine site; a picket line was maintained there for nine months; and no further attempts were made to open the mine during that period.[4]

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nessee Consolidated Coal Co., 131 N. L. R. B. 536, enforcement denied *sub nom. Labor Board* v. *Tennessee Consolidated Coal Co.*, 307 F. 2d 374 (C. A. 6th Cir. 1962). In the other, it found that Local 5881 had engaged in coercive picketing in violation of § 8 (b) (1) (A), 61 Stat. 140, 29 U. S. C. § 158 (b) (A) (1964 ed.), *Local 5881, UMWA*, 130 N. L. R. B. 1181. The International itself was not charged in this proceeding, and the Board's consideration focused entirely on the events of August 16.

[3] The only testimony suggesting that Gilbert might have been at the mine site on August 15–16 was Gibbs' statement that "Well, everything happened so fast there, I'm thinking that I seen Mr. Gilbert drive up there, but where he went, I don't know." Whether such testimony could ever be sufficient to establish presence we need not decide, since respondent effectively conceded in the Sixth Circuit and here that Gilbert was in Middlesboro when the violence occurred.

[4] Immediately after the Board's order in the proceedings against it, note 1, *supra*, Consolidated reopened the mine it had closed during the spring of 1960, and hired the men of Local 5881. Later, and while this litigation was awaiting trial, that mine was closed as the result of an accident. At this point, the fall of 1962, the Gray's Creek mine was opened using members of Local 5881.

Respondent lost his job as superintendent, and never entered into performance of his haulage contract. He testified that he soon began to lose other trucking contracts and mine leases he held in nearby areas. Claiming these effects to be the result of a concerted union plan against him, he sought recovery not against Local 5881 or its members, but only against petitioner, the International. The suit was brought in the United States District Court for the Eastern District of Tennessee, and jurisdiction was premised on allegations of secondary boycotts under § 303. The state law claim, for which jurisdiction was based upon the doctrine of pendent jurisdiction, asserted "an unlawful conspiracy and an unlawful boycott aimed at him and [Grundy] to maliciously, wantonly and willfully interfere with his contract of employment and with his contract of haulage."[5]

The trial judge refused to submit to the jury the claims of pressure intended to cause mining firms other than Grundy to cease doing business with Gibbs; he found those claims unsupported by the evidence. The jury's verdict was that the UMW had violated both § 303 and state law. Gibbs was awarded $60,000 as damages under the employment contract and $14,500 under the haulage contract; he was also awarded $100,000 punitive damages. On motion, the trial court set aside the award of damages with respect to the haulage contract on the ground that damage was unproved. It also held that union pressure on Grundy to discharge respondent as supervisor would constitute only a primary dispute with Grundy, as respondent's employer, and hence was not congnizable under § 303. Interference with employment was cognizable as a state claim, however, and a

[5] See *Dukes* v. *Brotherhood of Painters Local No. 437*, 191 Tenn. 495, 235, S. W. 2d 7 (1950); *Brumley* v. *Chattanooga Speedway and Motordrome Co.*, 138 Tenn. 534, 198 S. W. 775 (1917); *Dale* v. *Temple Co.*, 186 Tenn. 69, 208 S. W. 2d 344 (1948).

remitted award was sustained on the state law claim.[6] 220 F. Supp. 871. The Court of Appeals for the Sixth Circuit affirmed. 343 F. 2d 609. We granted certiorari. 382 U. S. 809. We reverse.

I.

A threshold question is whether the District Court properly entertained jurisdiction of the claim based on Tennessee law. There was no need to decide a like question in *Teamsters Union* v. *Morton*, 377 U. S. 252, since the pertinent state claim there was based on peaceful secondary activities and we held that state law based on such activities had been pre-empted by § 303. But here respondent's claim is based in part on proofs of violence and intimidation. "[W]e have allowed the States to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order. *United Automobile Workers* v. *Russell*, 356 U. S. 634; *United Construction Workers* v. *Laburnum Corp.*, 347 U. S. 656 . . . . State jurisdiction has prevailed in these situations because the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction." *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 247.

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[6] The questions had been submitted to the jury on a special verdict form. The suggested remittitur from $60,000 to $30,000 for damages on the employment contract and from $100,000 to $45,000 punitive damages was accepted by respondent. In view of our disposition, we do not reach petitioner's contentions that the verdict must be set aside in toto for prejudicial summation by respondent's counsel, or because the actual damages awarded substantially exceeded the proof, and the punitive damage award may have rested in part on the award of actual damages for interference with the haulage contract, which was vacated as unproved.

The fact that state remedies were not entirely preempted does not, however, answer the question whether the state claim was properly heard in the District Court absent diversity jurisdiction. The Court held in *Hurn* v. *Oursler*, 289 U. S. 238, that state law claims are appropriate for federal court determination if they form a separate but parallel ground for relief also sought in a substantial claim based on federal law. The Court distinguished permissible from nonpermissible exercises of federal judicial power over state law claims by contrasting "a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, and a case where two separate and distinct causes of action are alleged, one only of which is federal in character. In the former, where the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the non-federal *ground;* in the latter, it may not do so upon the non-federal *cause of action.*" 289 U. S., at 246. The question is into which category the present action fell.

Hurn was decided in 1933, before the unification of law and equity by the Federal Rules of Civil Procedure. At the time, the meaning of "cause of action" was a subject of serious dispute;[7] the phrase might "mean one thing for one purpose and something different for another." *United States* v. *Memphis Cotton Oil Co.*, 288

[7] See Clark, Code Pleading, 75 *et seq.* (1928); Clark, The Code Cause of Action, 33 Yale L. J. 1291 (1924); McCaskill, Actions and Causes of Actions, 34 Yale L. J. 614 (1925); McCaskill, One Form of Civil Action But What Procedure for the Federal Courts, 30 Ill. Rev. 415 (1935); Gavit, A "Pragmatic Definition" of the "Cause of Action"? 82 U. Pa. L. Rev. 129 (1933); Clark, The Cause of Action, *id.*, at 354 (1934); Gavit, The Cause of Action, a Reply, *id.*, at 695 (1934).

U. S. 62, 67–68.[5] The Court in *Hurn* identified what it meant by the term by citation of *Baltimore S. S. Co. v. Phillips*, 274 U. S. 316, a case in which "cause of action" had been used to identify the operative scope of the doctrine of *res judicata*. In that case the Court had noted that " 'the whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time,' " 274 U. S., at 320, and stated its holding in the following language, quoted in part in the *Hurn* opinion:

> "Upon principle, it is perfectly plain that the respondent [a seaman suing for an injury sustained while working aboard ship] suffered but one actionable wrong and was entitled to but one recovery, whether his injury was due to one or the other of several distinct acts of alleged negligence or to a combination of some or all of them. In either view, there would be but a single wrongful invasion of a single primary right of the plaintiff, namely, the right of bodily safety, whether the acts constituting such invasion were one or many, simple or complex.
>
> "A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong. The mere multiplication of grounds of negligence alleged as causing the same injury does not result in multiplying the causes of action. 'The facts are merely the means,

[5] See also *American Fire & Cas. Co.* v. *Finn*, 341 U. S. 6, 12; *Musher Foundation, Inc.* v. *Alba Trading Co.*, 127 F. 2d 9, 12 (C. A. 2d Cir. 1944) (dissenting opinion of CLARK, J.).

> and not the end. They do not constitute the cause of action, but they show its existence by making the wrong appear.'" *Id.*, at 321.

Had the Court found a jurisdictional bar to reaching the state claim in *Hurn*, we assume that the doctrine of *res judicata* would not have been applicable in any subsequent state suit. But the citation of *Baltimore S. S.* shows that the Court found that the weighty policies of judicial economy and fairness to parties reflected in *res judicata* doctrine were in themselves strong counsel for the adoption of a rule which would permit federal courts to dispose of the state as well as the federal claims.

With the adoption of the Federal Rules of Civil Procedure and the unified form of action, Fed. Rules Civ. Proc. 2, much of the controversy over "cause of action" abated. The phrase remained as the keystone of the *Hurn* test, however, and, as commentators have noted,[9] has been the source of considerable confusion. Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies are strongly encouraged.[10] Yet because the *Hurn* question involves issues of jurisdiction as well as convenience, there has been some tendency to limit its application to cases in which the state and federal claims are, as in *Hurn*, "little more than the equivalent of different epithets to characterize the same group of circumstances." 289 U. S., at 246.[11]

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[9] Shulman and Jaegerman, Some Jurisdictional Limitations on Federal Procedure, 45 Yale L. J. 393, 397–410 (1936); Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law and Contemp. Prob. 216, 232 (1948); Barron and Holtzoff, Federal Practice and Procedure, § 23, at 100 (Rev. ed. 1960).

[10] See, *e. g.*, Fed. Rules Civ. Proc. 2, 18–20, 42.

[11] *E. g.*, *Musher Foundation* v. *Alba Trading Co.*, *supra*; Note, The Evolution and Scope of the Doctrine of Pendant Jurisdiction in the Federal Courts, 62 Col. L. Rev. 1018, 1029–1030 (1962).

This limited approach is unnecessarily grudging. Pendent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim "arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . ." U. S. Const., Art. III, § 2, and the relationship between that claim and the state claims made in the complaint permits the conclusion that the entire action before the court comprises but one constitutional "case."[12] The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. *Levering & Garrigues Co.* v. *Morrin*, 289 U. S. 103. The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard for their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.[13]

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[12] The question whether joined state and federal claims constitute one "case" for jurisdictional purposes is to be distinguished from the often equally difficult inquiry whether any "case" at all is presented, *Gully* v. *First National Bank*, 299 U. S. 109, although the issue whether a claim for relief qualifies as a case "arising under . . . the laws of the United States" and the issue whether federal and state claims constitute one "case" for pendent jurisdiction purposes may often appear together, see *Dann* v. *Studebaker-Packard Corp.*, 288 F. 2d 201, 211–215 (C. A. 6th Cir. 1961); *Borak* v. *J. I. Case Co.*, 317 F. 2d 838, 847–848 (C. A. 7th Cir. 1963), aff'd on other grounds, 377 U. S. 426.

[13] Cf. *Armstrong Co.* v. *Nu-Enamel Corp.*, 305 U. S. 315, 325. Note, Problems of Parallel State and Federal Remedies, 71 Harv. L. Rev. 513, 514 (1958). While it is commonplace that the Federal Rules of Civil Procedure do not expand the jurisdiction of federal courts, they do embody "the whole tendency of our decisions . . . to require a plaintiff to try his . . . whole case at one time," *Baltimore S. S. Co.* v. *Phillips*, *supra*, and to that extent emphasize the basis of pendent jurisdiction.

That power need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right.[14] Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them, *Erie R. Co.* v. *Tompkins*, 304 U. S. 64. Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer footed reading of applicable law.[15] Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.[16] Similarly, if it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and

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[14] *Massachusetts Universalist Convention* v. *Hildreth & Rogers*, 183 F. 2d 497 (C. A. 1st Cir. 1950); *Moynahan* v. *Pari-Mutuel Employees Guild*, 317 F. 2d 209, 211–212 (C. A. 9th Cir. 1963); *op. cit. supra*, notes 9 & 11.

[15] Some have seen this consideration as the principal argument against exercise of pendent jurisdiction. Thus, before *Erie*, it was remarked that "the limitations [on pendent jurisdiction] are in the wise discretion of the courts to be fixed in individual cases by the exercise of that statesmanship which is required of any arbiter of the relations of states to nation in a federal system." Shulman and Jaegerman, *supra*, note 3, at 408. In his oft-cited concurrence in *Strachman* v. *Palmer*, 177 F. 2d 427, 431 (C. A. 1st Cir. 1949), Judge Magruder counseled that "[f]ederal courts should not be overeager to hold on to the determination of issues that might be more appropriately left to settlement in state court litigation," at 433. See also *Wechsler*, *supra*, note 3, at 232–233; Note, 74 Harv. L. Rev. 1660, 1661 (1961); Note, *supra*, note 11, at 1043–1044 (1962).

[16] Note, *supra*, note 11, at 1025–1026; *Wham-O Mfg. Co.* v. *Paradise Mfg. Co.*, 327 F. 2d 748, 752–754 (C. A. 9th Cir. 1964).

left for resolution to state tribunals. There may, on the other hand, be situations in which the state claim is so closely tied to questions of federal policy that the argument for exercise of pendent jurisdiction is particularly strong. In the present case, for example, the allowable scope of the state claim implicates the federal doctrine of pre-emption; while this interrelationship does not create statutory federal question jurisdiction, *Louisville & N. R. Co.* v. *Mottley*, 211 U. S. 149, its existence is relevant to the exercise of discretion. Finally, there may be reasons independent of jurisdictional considerations, such as the likelihood of jury confusion in treating divergent legal theories of relief, that would justify separating state and federal claims for trial, Fed. Rules Civ. Proc. 42 (b); if so, jurisdiction here, too, should ordinarily be refused.

The question of power will ordinarily be resolved on the pleadings. But the issue whether pendent jurisdiction has been properly assumed is one which remains open throughout the litigation. Pretrial procedures or even the trial may reveal a substantial hegemony of state law claims, or likelihood of jury confusion, which could not have been anticipated at the pleading stage. Although it will of course be appropriate to take account in this circumstance of the already completed course of the litigation, dismissal of the state claim might even then be merited. For example, it may appear that the plaintiff was well aware of the nature of his proofs and the relative importance of his claims; recognition of a federal court's wide latitude to decide ancillary questions of state law does not imply that it must tolerate a litigant's effort to impose upon it what is in effect only a state law case. Once it appears that a state claim constitutes the real body of a case, to which the federal claim is only an appendage, the state claim may fairly be dismissed.

We are not prepared to say that in the present case the District Court exceeded its discretion in proceeding to judgment on the state claim. We may assume for purposes of decision that the District Court was correct in its holding that the claim of pressure on Grundy to terminate the employment contract was outside the purview of § 303. Even so, the § 303 claims based on secondary pressures on Grundy relative to the haulage contract and on other coal operators generally were substantial. Although § 303 limited recovery to compensatory damages based on secondary pressures, *Teamsters Union* v. *Morton*, *supra*, and state law allowed both compensatory and punitive damages, and allowed such damages as to both secondary and primary activity, the state and federal claims arose from the same nucleus of operative fact and reflected alternative remedies. The jury was so instructed on its verdict sheet, which allowed no room for the award of double damages, one on the federal and one on the state claim.

It is true that the § 303 claims ultimately failed and that the only recovery allowed respondent was on the state claim. We cannot confidently say, however, that the federal issues were so remote or played such a minor role at the trial that in effect the state claim only was tried. Although the District Court dismissed as unproved the claims that petitioner's secondary activities included attempts to induce coal operators other than Grundy to cease doing business with respondent, the court submitted the § 303 claims relating to Grundy to the jury. The jury returned verdicts against petitioner on those claims, and it was only on petitioner's motion for a directed verdict and a judgment *n. o. v.* that they were set aside. The District Judge considered the claim as to the haulage contract proved as to liability, and held it failed only for lack of proof of damages. Although there was some risk of confusing the jury in joining the

state and federal claims—especially since, as will be developed, differing standards of proof of UMW involvement applied—the possibility of confusion could be lessened by employing a special verdict form, as the District Court did. Moreover, the question whether the permissible scope of the state claim was limited by the doctrine of pre-emption afforded a special reason for the exercise of pendent jurisdiction; the federal courts are particularly appropriate bodies for the application of pre-emption principles. We thus conclude that although it may be that the District Court might, in its sound discretion, have dismissed the state claim, the circumstances show no error in refusing to do so.

II.

This Court has consistently recognized the right of States to deal with violence and threats of violence appearing in labor disputes, sustaining a variety of remedial measures against the contention that state law was pre-empted by the passage of federal labor legislation. *Allen-Bradley Local* v. *Wisconsin Board*, 315 U. S. 740; *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U. S. 656; *United Automobile Workers* v. *Wisconsin Board*, 351 U. S. 266; *Youngdahl* v. *Rainfair, Inc.*, 355 U. S. 131; *United Automobile Workers* v. *Russell*, 356 U. S. 634. Petitioner concedes the principle, but argues that the permissible scope of state remedies in this area is strictly confined to the direct consequences of such conduct, and does not include consequences resulting from associated peaceful picketing or other union activity. We agree.

Our opinions on this subject, frequently announced over weighty arguments in dissent that state remedies were being given too broad scope, have approved only remedies carefully limited to the protection of the compelling state interest in the maintenance of domestic

peace. Thus, in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, we read our prior decisions as only allowing "the States to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order," *id.*, at 247, and noted that in *Laburnum*

> "damages were restricted to the 'damages directly and proximately caused by wrongful conduct chargeable to the defendants . . .' as defined by the traditional law of torts . . . . Thus there is nothing in the measure of damages to indicate that state power was exerted to compensate for anything more than the direct consequences of the violent conduct." *Id.*, at 248–249, n. 6.

In *Russell*, we specifically observed that the jury had been charged that to award damages it must find a proximate relation between the violence and threats of force and violence complained of, on the one hand, and the loss of wages allegedly suffered, on the other. 356 U. S., at 638, n. 3. In the two *Wisconsin Board* cases it was noted that the State's administrative-injunctive relief was limited to prohibition against continuation of the unlawful picketing, not all picketing. 315 U. S., at 748; 351 U. S., at 269–270, n. 3. And in *Youngdahl*, *supra*, the Court held that a state court injunction which would have prohibited all picketing must be modified to permit peaceful picketing of the premises; we said, "[t]hough the state court was within its discretionary power in enjoining future acts of violence, intimidation and threats of violence by the strikers and the union, yet it is equally clear that such court entered the pre-empted domain of the National Labor Relations Board insofar as it enjoined peaceful picketing . . . ." 355 U. S., at 139.[17]

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[17] In *Teamsters Union* v. *Morton*, *supra*, a similar analysis was applied to permit recovery under § 303 of damages suffered during

It is true that in *Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 312 U. S. 287, the Court approved sweeping state injunctive relief barring any future picketing in a labor dispute, whether peaceful or not. That case, however, was decided only on a constitutional claim of freedom of speech; we did not consider the impact of federal labor policy on state regulatory power. Moreover, as we recognized in *Youngdahl, supra*, at 139, the case was decided in the context of a strike marked by extreme and repeated acts of violence—"a pattern of violence . . . which would inevitably reappear in the event picketing were later resumed." The Court in *Meadowmoor* had stated the question presented as "whether a state can choose to authorize its courts to enjoin acts of picketing in themselves peaceful when they are enmeshed with contemporaneously violent conduct which is concededly outlawed," 312 U. S., at 292, and had reasoned that

> "acts which in isolation are peaceful may be part of a coercive thrust when entangled with acts of violence. The picketing in this case was set in a background of violence. In such a setting it could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful." *Id.*, at 294.

Such special facts, if they appeared in an action for damages after picketing marred by violence had occurred, might support the conclusion that all damages resulting from the picketing were proximately caused by its violent component or by the fear which that violence

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a strike characterized by proscribed secondary activity only to the extent that the damages claimed were the proximate result of such activity; damages for associated primary strike activity could not be recovered.

engendered.[18] Where the consequences of peaceful and violent conduct are separable, however, it is clear that recovery may be had only for the latter.

In the present case, petitioner concedes that violence which would justify application of state tort law within these narrow bounds occurred during the first two days of the strike. It is a separate issue, however, whether the pleadings, the arguments of counsel to the jury, or the instructions to the jury adequately defined the compass within which damages could be awarded under state law. The tort claimed was, in essence, a "conspiracy" to interfere with Gibbs' contractual relations. The tort of "conspiracy" is poorly defined, and highly susceptible to judicial expansion; its relatively brief history is colored by use as a weapon against the developing labor movement.[19] Indeed, a reading of the record in this case gives the impression that the notion of "conspiracy" was employed here to expand the application of state law substantially beyond the limits to be observed in showing direct union involvement in violence.

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[18] It would of course be relevant if the Board had already intervened and as here, note 2, *supra*, issued an order which permitted the continuance of peaceful picketing activity.

[19] On the flexibility of "conspiracy" as a tort, see *Original Ballet Russe Ltd.* v. *Ballet Theatre, Inc.*, 133 F. 2d 187, 189 (C. A. 2d Cir. 1943); *Riley* v. *Dun & Bradstreet, Inc.*, 195 F. 2d 812 (C. A. 6th Cir. 1952); Charlesworth, Conspiracy as a Ground of Liability in Tort, 36 L. Q. Rev. 38 (1936); Burdick, Conspiracy as a Crime, and as a Tort, 7 Col. L. Rev. 229 (1907); Burdick, The Tort of Conspiracy, 8 Col. L. Rev. 117 (1908). The anti-labor uses of the doctrine are well illustrated in Sayre, Labor and the Courts, 39 Yale L. J. 682, 684–687 (1930). Similar dangers are presented by the tort of malicious interference with contract, *id.*, at 691–695, a doctrine equally young which in its origins required a showing of interference by force, threats, or fraud, but does so no more, Sayre, Inducing Breach of Contract, 36 Harv. L. Rev. 663 (1923); Note, 56 Nw. U. L. Rev. 391 (1961).

Thus, respondent's complaint alleged "an unlawful conspiracy and an unlawful boycott . . . to maliciously, wantonly and willfully interfere with his contract of employment and with his contract of haulage." No limitation to interference *by violence* appears. Similarly, counsel in arguing to the jury asserted, not that the conspiracy in which the union had allegedly participated and from which its liability could be inferred was a conspiracy of violence but that it was a conspiracy to impose the UMW and the UMW's standard contract on the coal fields of Tennessee.[20] Under the state law, it would not have been relevant that the union had not actually authorized, participated in or ratified the particular violence involved or even the general use of violence. It would only be necessary to show a conspiracy in which the union had a part, and to show also that those who engaged in the violence were members of the conspiracy and their acts were related to the conspiracy's purpose.[21]

The instructions to the jury also appear not to have kept the conspiracy concept within any proper bounds. The charge instructed the jury separately on the secondary boycott and conspiracy claims, characterizing each as an assertion of "unlawful" picketing action, and distinguishing one from the other on the basis that in the conspiracy claim, "the lawfulness of the means rather than the lawfulness of the object or the purpose of the picketing . . . is controlling." But in

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[20] Respondent's attorney argued in summation:

". . . and here is the conspiracy. Mr. Pass [an official of petitioner's] testified, we want that contract all over this nation. That contract or better. I don't guess at that, there is his testimony. There is no deviation from that contract, Mr. Turnblazer so says, unless it is approved in Washington. They impose a nationwide contract all over this nation, all over. I don't care whether it is in Canada or West Virginia or California or Tennessee."

[21] Note 5, *supra*.

charging the conspiracy claim, the court stressed the "unlawfulness" of the picketing, rather than violence as such, as controlling. Thus, in characterizing respondent's claim of intentional interference with his contractual relations with Grundy, the court said respondent asserted the interference to be "wrongful in that it was accomplished by unlawful means, including violence and threats of violence." Turning to the question of the international union's responsibility, he said this depended on a showing that it "was a party to a conspiracy pursuant to which the interference was committed." He defined conspiracy as

> "an agreement between two or more . . . to do an unlawful thing, or to do a lawful thing by unlawful means. . . . . It is not essential to the existence of a conspiracy that the agreement between the conspirators be formally made between the parties at any one time, if, for example, two persons agreed to pursue an unlawful purpose or pursue a lawful purpose by unlawful means, then later a third person with knowledge of the existence of the conspiracy assents to it either impliedly or expressly and participates in it, then all three are conspirators in the same conspiracy. . . . [A]ll that is required is that each party to the conspiracy know of the existence of the conspiracy and that each agrees to assist in some manner in the furtherance of the unlawful purpose . . . or any unlawful means of accomplishing an unlawful purpose."

The trial judge then charged, in accordance with the Tennessee common law on conspiracy,[22] that the union, if a member of a conspiracy, would be liable for all acts "done in concert . . . with the common purpose, and to effect

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[22] *Ibid.*

a common design," whether or not it had authorized, participated in, or ratified the particular acts; the jury was told it might award "only such damages as . . . he has sustained as a proximate and direct result of the action of the defendant," and that "[n]o award of damages can be made . . . on the basis of losses sustained . . . as a result of lawful activity upon the part of the defendant or its agents." Such instructions do not focus the jury's attention upon violence or threats of violence as the essential predicate of any recovery they might award.

III.

Even assuming the conspiracy concept could be and was kept within limits proper to application of state law under the pre-emption doctrine, reversal is required here for failure to meet the special proof requirements imposed by § 6 of the Norris-LaGuardia Act: [23]

> "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."

Petitioner vigorously contends that § 6 applied to the state claims in this case; that, on this record, it cannot be charged with having participated in or authorized the violence of August 15–16; and that its acts once it learned of the violence fell short of what would be necessary to show either ratification of the violence or any intent to build its picketing campaign upon the fears the violence engendered. We agree.

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[23] 47 Stat. 71, 29 U. S. C. § 106 (1964 ed.).

We held in *Brotherhood of Carpenters* v. *United States*, 330 U. S. 395, 403, that

> "whether § 6 should be called a rule of evidence or one that changes the substantive law of agency . . . its purpose and effect was to relieve organizations . . . and members of those organizations from liability for damages or imputation of guilt for lawless acts done in labor disputes by some individual officers or members of the organization, without clear proof that the organization or member charged with responsibility for the offense actually participated, gave prior authorization, or ratified such acts after actual knowledge of their perpetration."

Shortly thereafter, Congress passed the Labor Management Relations Act, which expressly provides that for the purposes of that statute, including § 303, the responsibility of a union for the acts of its members and officers is to be measured by reference to ordinary doctrines of agency, rather than the more stringent standards of § 6.[24] Yet although the legislative history indicates that Congress was well aware of the *Carpenters* decision,[25] it did not repeal § 6 outright, but left it applicable to cases not arising under the new Act. This selectivity is not surprising, for on state claims, though not on § 303 claims, punitive damages may be recovered. The driving force behind § 6 [26] and the opposition to § 303, even in its limited form,[27] was the fear that unions might be destroyed

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[24] Labor Management Relations Act, 1947, §§ 102 (13), 301 (e), 303 (b), 61 Stat. 137, 156, 158, 29 U. S. C. §§ 152 (13), 185 (e), 187 (b).

[25] See, *e. g.*, S. Rep. No. 105, 80th Cong., 1st Sess., p. 21.

[26] The fullest statement of the basis for § 6 appears in S. Rep. No. 163, 72d Cong., 1st Sess., pp. 19–21.

[27] The present § 303 was introduced on the floor of the Senate by Senator Taft, in response to a more severe proposal which would have permitted injunctive relief as well as damages against secondary

if they could be held liable for damage done by acts beyond their practical control. Plainly, § 6 applies to federal court hearings of state tort claims arising out of labor disputes, whether or not they are associated with claims under § 303 to which the section does not apply.[28]

Although the statute does not define "clear proof," its history and rationale suggest that Congress meant at least to signify a meaning like that commonly accorded such similar phrases as "clear, unequivocal, and convincing proof." The proponent in a civil case is not required to satisfy the criminal standard of reasonable doubt on the issue of participation, authorization or ratification; neither may he prevail by meeting the ordinary civil burden of persuasion. He is required to persuade by a substantial margin, to come forward with "more than a bare preponderance of the evidence to prevail." *Schneiderman* v. *United States*, 320 U. S. 118, 125. On our view, that burden was not met.[29]

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activity. 93 Cong. Rec. 4900, 5036–5049, 5060–5076 (1947). The tenor of the opposition may be seen in those pages, and also at 93 Cong. Rec. 1337 (Remarks of Senator Thomas); 93 Cong. Rec. 6608–6609 (Remarks of Senator Morse); 93 Cong. Rec. 6680–6681 (Remarks of Senator Pepper).

[28] The argument might be made that if there were "clear proof" that the local union was responsible, the responsibility of the international union *vis-à-vis* its local would be governed by a less demanding standard than that applicable for determining the responsibility of a labor organization or its officers on the basis of the acts of "individual officers, members or agents" of the organization. Since the local was not a party here, we have no occasion to assess this issue. Liability of the International is premised on the acts of Gilbert and the UMW's other agents, or not at all.

[29] In charging the jury, the trial judge first instructed the jury at length that the plaintiff's burden was to prove his case by a preponderance of the evidence, and that "if the plaintiff carries the burden of proof by a preponderance of the evidence, however slight that preponderance might be, he has done all that is required of

At the outset, it is clear that the requisite showing was not made as to possible union authorization of or participation in the violence of August 15 and 16. Although it is undoubtedly true that the officers and members of Local 5881 were present in force at the mine site on those days, they are not parties to this suit. Mr. Gilbert, the UMW representative, had left the area for a business meeting before the series of events culminating in the violence, and immediately upon his return, it subsided. The Sixth Circuit conceded that "[t]he proofs were sketchy as to defendant's responsibility for the [first two days' violence]"; this view accurately reflects the state of the record. Petitioner was not even aware of Grundy's plan to open the Gray's Creek mine until after the violence had occurred.

The remaining issue is whether there was clear proof that the union ratified the violence which had occurred. Preliminarily, we note that it would be inconsistent with the fabric of national labor policy to infer ratification from the mere fact that petitioner involved itself in the dispute after the violence had occurred, or from the fact that it carried on some normal union functions, such as provision of strike relief; a union would ordinarily under-

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him and is entitled to a verdict." In connection with substantive discussion of the state claim, he then remarked:

"Before the defendant may be held responsible for the acts of its agents in entering into a conspiracy during the course of a labor dispute, there must be clear proof that the particular conspiracy charged or the act generally of that nature had been expressly authorized or necessarily followed from a granted authority by the defendant, or that such conspiracy was subsequently ratified by the defendant after actual knowledge thereof."

The phrase "clear proof," referred to just this once, was never explained. The possibility is strong that the jury either did not understand the phrase or completely overlooked it in the context of the lengthy charge given. No challenge is directly made to the charge, however, and it does not appear whether an objection was entered. Accordingly, we do not rest judgment on this point.

take these tasks during the course of a lawful strike. National labor policy requires that national unions be encouraged to exercise a restraining influence on explosive strike situations; when they seek to do so, they should not for these activities be made to risk liability for such harm as may already have been done. The fact that ripples of the earlier violence may still be felt should not be permitted, and under § 6 is not permitted, to impose such liability. Because the dispute which sparked the violence will often continue, the union will feel a responsibility to take up the dispute as well as to curb its excesses. There can be no rigid requirement that a union affirmatively disavow such unlawful acts as may previously have occurred. Cf. *ILGWU* v. *Labor Board*, 237 F. 2d 545. What is required is proof, either that the union approved the violence which occurred, or that it participated actively or by knowing tolerance in further acts which were in themselves actionable under state law or intentionally drew upon the previous violence for their force.

The record here is persuasive that the petitioner did what it could to stop or curtail the violence. There was repeated and uncontradicted testimony that when news of the violence reached the meeting at which Gilbert was in attendance, he was given firm instructions to return to the scene, to assume control of the strike, to suppress violence and limit the size of the picket line, and to assure that no other area mines were affected.[30] He

[30] Other International personnel were also sent, perhaps in part because the union wanted to put its best foot forward in the pending NLRB proceedings, note 1, *supra*. One such person testified,

". . . I explained to them that the labor board was there investigating and that certainly any mass picketing would only cause them a great deal of trouble, and instructed them that they should limit the number of their pickets and under no circumstances have any violence or any threats of violence to any person coming into or near that area."

succeeded. Although the day after his return two Consolidated officers were harassed by a large and unruly mob in a nearby town, this incident was unrelated to respondent, and was not repeated. There was no further violence at the mine site, and the number of pickets was reduced to a very few. Other mines in the immediate area, including two worked on lease by Gibbs, continued to operate, although strenuous effort was required to accomplish this; one union official testified, "I thought I was going to get whipped two or three times [by members of the Local who opposed this policy]." [31]

To be sure, there was testimony that Gilbert and, through him, the International were not pleased with respondent's role in the abortive venture to open the Gray's Creek mines with members of the Southern Labor Union. A company officer testified that when the mines finally opened respondent was not hired, because "Had I hired Paul Gibbs none of these mines would be open today." Respondent testified that Gilbert had told him, shortly after assuming control of the strike, "I want you to keep your damn hands off of that Gray's Creek area over there and tell that Southern Labor Union that we don't intend for you to work that mine." To another, Gilbert is alleged to have said, "Hell, we can't let that

[31] About six days after the violence, an earthmoving equipment salesman driving by the entrance to the mine site stopped to ask how he might get to another mine. Gilbert was present among the picketers, and gave him instructions. Gilbert told the salesman that he "couldn't get through" the road chosen, and should approach by another route; he said the salesman should tell any union men he met that he had spoken to Gilbert. A sinister cast can be put on this incident, but it shows clearly only that Gilbert was in control of the strike and that operations unrelated to Gray's Creek were not being interfered with. It is significant that the salesman did not claim to have been stopped by force or threatened in any way; it appears he did no more than seek directions, and received no more in return.

go on . . . Paul was trying to bring the other union in there, and [Gilbert said] he ain't going to get by with it." A third witness reported remarks of a similar tenor. Respondent testified that fear for his own safety caused him not to visit his mine leases after the events of the fifteenth and sixteenth; his foreman testified to minor acts of violence at the mine site, never connected to any any person or persons.

The relevant question, however, is whether Gilbert or other UMW representatives were clearly shown to have endorsed violence or threats of violence as a means of settling the dispute. The Sixth Circuit's answer was that they had. Its view of the record gave it

> "the impression that the threat of violence remained throughout the succeeding days and months. The night and day picketing that followed its spectacular beginning was but a guaranty and warning that like treatment would be accorded further attempts to open the Gray's Creek area. The aura of violence remained to enhance the effectiveness of the picketing. Certainly there is a threat of violence when the man who has just knocked me down my front door steps continues to stand guard at my front door." 343 F. 2d, at 616.

An "impression" is too ephemeral a product to be the result of "clear proof." As we have said, the mere fact of continued picketing at the mine site is not properly relied upon to show ratification. But even accepting the passage as a holding that "clear proof" of UMW involvement is present, we do not so read the record.

If there was a remaining threat of violence here, it was a threat which arose from the context of the dispute, and not from the manner in which the International was shown to have handled it. This dispute began when unemployed miners in the Appalachian hills discovered

that jobs they believed had been promised to them were being given to others behind their backs. In considering the *vicarious* liability of the International, accommodation must be made for that fact. The record here clearly bears the construction that the International exerted pressure to assure that respondent would lose his present jobs and obtain no more. But it fails at rebutting the petitioner's contention that it had stopped short of willingness to see its ends accomplished through violence, and indeed had sought to control the excesses which had occurred. Since the record establishes only peaceful activities in this regard on the part of petitioner, respondent was limited to his § 303 remedy. *Teamsters Union* v. *Morton, supra.* Although our result would undoubtedly be firmer if the petitioner had assured respondent that, having assumed control of the strike, it would prevent further violence, in the circumstances of this case the crucial fact of petitioner's participation in or ratification of the violence that occurred was not proved to the degree of certainty required by § 6.

Reversed.

THE CHIEF JUSTICE took no part in the decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 243.—October Term, 1965.

United Mine Workers of America, Petitioner, *v.* Paul Gibbs.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[March 28, 1966.]

Mr. Justice Harlan, whom Mr. Justice Clark joins, concurring.

I agree with and join in Part I of the Court's opinion relating to pendent jurisdiction. As to Part II, I refrain from joining the Court's speculations about the uses to which it may put the pre-emption doctrine in similar future cases. The holding in Part III that the Norris-LaGuardia Act requires reversal here seems to me correct, but my interpretation of the statute is different and somewhat narrower than that of the Court.

The statutory requirement for union liability in this case is "clear proof of actual participation in, or actual authorization of . . . [the unlawful acts], or of ratification of such acts after actual knowledge thereof."[1] The Court construes this provision as fixing a new test of the quantum of proof, somewhere between ordinary civil and criminal standards. I do not think the admittedly vague legislative history imports this reading, and I believe it introduces a revealing inconsistency since the new test could not be applied to criminal cases, concededly governed by the same statutory language, without standing the statute on its head by having it *reduce* present quantum-of-proof requirements in criminal cases, that is, proof "beyond a reasonable doubt." The best

[1] Norris-LaGuardia Act, § 6, 47 Stat. 71, 29 U. S. C. § 106 (1964 ed.). The section is quoted in full at p. 19, *ante*.

reading I can give the statute, absent more light than has been shed upon it in this case, is one directing it against a particular type of inferential proof of authority or ratification unacceptable to those who framed the law. For me, the gist of the statute is that in the usual instance a union's carrying on of its normal strike functions and its failure to take affirmative action to dispel misconduct are not in themselves proof of authorization or ratification of the wrongdoing.[2]

In the present case, apart from a few quite ambiguous episodes, there was nothing to bring the violence home to the union except, as the Sixth Circuit stressed (see p. 25, *ante*), that the union continued through its picketing the threat that the earlier violence would be renewed and did not repudiate the violence or promise to oppose its renewal. Whatever arguments could be made for imposing liability in such a situation, I think it approximates what the statute was designed to forbid. On this basis, I concur in the reversal.

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[2] The principle legislative document, S. Rep. No. 163, 72 Cong., 1st Sess., pp. 19–21, is not very illuminating but it does at the end of its discussion of the section make reference to Frankfurter and Greene, The Labor Injunction, pp. 74–75 (1930). At these pages, to illustrate rulings on union responsibility that are deemed improper, that book states: "'Authorization' has been found as a fact where the unlawful acts 'have been on such a large scale, and in point of time and place so connected with the admitted conduct of the strike, that it is impossible on the record here to view them in any other light than as done in furtherance of a common purpose and as part of a common plan'; where the union has failed to discipline the wrong-doer; where the union has granted strike benefits." (Footnotes omitted.) See also *id.*, at 220–221, n. 42; *United Brotherhood of Carpenters* v. *United States*, 330 U. S. 395, 418–419 and n. 2 (Frankfurter, J., dissenting).